



INVESTIGATIVE REPORT
(Finding of Record and Recommendations)

Ombudsman Complaints A2006-0546, A2006-0583, and J2006-0165
December 6, 2007

*Public Version: Edited to remove confidential information
and the identities of complainants.*

SUMMARY

This report concerns allegations against the Designated Ethics Supervisor (DES) for the Department of Natural Resources (DNR). Specifically, it concerns his handling of two reports of potential violations of the Executive Branch Ethics Act forwarded to him by the ombudsman. The reports involved three different divisions of DNR.

Division of Mining, Land & Water and Division of Forestry (A2006-0546 and J2006-0165)

In May 2006 a citizen contacted the ombudsman to complain about DNR's handling of an over-the-counter land sale. One of the citizen's concerns was that DNR Division of Forestry employees in Tok appeared to have transacted personal business using state equipment. The citizen said she had learned from staff at the Division of Mining, Land & Water (DMLW) that two Forestry employees used state equipment to purchase a parcel of land in Tok that the complainant wanted to purchase from DMLW. The complainant voiced a concern that DMLW staff might have improperly communicated to the Forestry employees the availability of the parcel after the complainant inquired about it at the Fairbanks DMLW Public Information Center.

Review of DMLW records and interviews with DMLW staff who had interacted with the complainant in April 2006 persuaded the ombudsman investigator that DMLW staff had acted properly, but the ombudsman review revealed that the Forestry employees used a state fax machine to send their application and payment for a parcel of land to DMLW during state business hours. The ombudsman investigator obtained copies of the sale documents, including the faxed forms with printed datelines, and compared times with the employees' timesheets. It appeared from these records that the transaction might have taken place during these employees' working hours.

The ombudsman investigator asked DNR's designated supervisor for ethics, Dan Saddler, to review the documents in light of provisions in the Executive Branch Ethics Act.¹ Mr. Saddler

¹ The Executive Branch Ethics Act (AS 39.52) provides that the commissioner is the "designated supervisor" for ethics for an executive department and gives the commissioner authority to delegate this duty to a subordinate ("a public officer designated by a commissioner . . . to act as the supervisor"). AS 39.52.960(8). The person who assumes this duty is sometimes referred to as the "designated ethics supervisor" or DES and will be referred to as such in this report. The Executive Branch Ethics Act will be referred to as the EBEA.

agreed, and the ombudsman investigator mailed the documents to him on June 20, 2006. After several reminders, Mr. Saddler wrote an August 2, 2006 e-mail message to the ombudsman investigator stating that he had investigated the report and concluded the Forestry employees "did commit technical violations of 39.52.120(b)(3) by using state time and equipment to do personal business." However, he wrote, "It would be my determination as DNR ethics supervisor that the phone call and fax transmission in support of the land purchase was not a significant use of state time or equipment." Mr. Saddler said he would "have the supervisor of the DNR office in question remind his employees that state law prohibits them from using state equipment or time for personal interests."

The ombudsman relayed this information to the complainant and closed the two ombudsman complaints as resolved.

Division of Parks and Outdoor Recreation (J2006-0583)

A second person reported in May 2006 that the Northern Area supervisor for the Division of Parks and Outdoor Recreation (DPOR) authorized the expenditure of \$250 in state funds to rent a fork-lift from a company owned by the family of one of her subordinates at the division.

The reporter said the amount of the one-time rental was small but pointed to the potential conflict of interest (noting that the same piece of equipment was available locally at more than one private-sector equipment rental business) and wondered if the supervisor had obtained from the department DES a waiver, a determination, or opinion that the transaction would not violate the EBEA.

The ombudsman investigator asked DNR's DES, Mr. Saddler, to evaluate this report in light of provisions in the EBEA. He agreed, and the ombudsman investigator faxed him information about the report on July 31, 2006.

On October 30, 2006, after repeated inquiries by the ombudsman investigator, Mr. Saddler said he found "nothing wrong" with DPOR renting equipment from the employee's family-owned business because it occurred after the employee had terminated employment with the state. He said he could find no record that either the supervisor or the subordinate had contacted him or submitted an ethics disclosure statement regarding this rental. The ombudsman investigator asked Mr. Saddler to document the date the work was performed and the employee's termination date.

On November 2, 2006, Mr. Saddler reported to the ombudsman investigator that his earlier determination had been mistaken, that the rental had taken place while the employee still worked for DNR. Mr. Saddler said the supervisor authorized the rental based on the subordinate's "claim that [he] could get it at a good price from his brother's company." Mr. Saddler said the supervisor explained she knew the subordinate had several brothers, but she did not realize he had a personal interest in the family business.

Mr. Saddler told the ombudsman investigator that the subordinate was "culpable for violating departmental policy against employees contracting with the department," and the supervisor was "somewhat culpable for not ensuring the rental contract fully complied with DNR policy." "However," he wrote, "I find that her culpability does not rise to the level of significant violation" because the contract led to important work being accomplished for the division and because of the subordinate's "failure to make clear his personal interest in the rental."

The ombudsman investigator requested documentation of Mr. Saddler's investigation of this report of a potential ethics violation. On November 16, 2006, the ombudsman sent a staff member to DES Saddler's office to obtain the entire file on his investigation. He provided only copies of information the ombudsman investigator had previously given him, saying he did not

keep any documentation other than what the ombudsman had provided to him three months before. Mr. Saddler offered to try to obtain phone records and e-mail records to document his contacts with the DPOR supervisor, but was unable to do so. He did not inform the ombudsman about the results of his efforts.

ALLEGATIONS

The DES's handling of these reports of potential ethics violations raised a number of questions about the standards against which the performance of a DES could be measured. Accordingly, the ombudsman opened an investigation into the following allegations, restated to conform to statutory guidelines for investigations by the ombudsman (AS 24.55.150):

Allegation 1: The Designated Ethics Supervisor for DNR performed inefficiently in investigating potential violations of the Executive Branch Ethics Act.

Allegation 2: The Designated Ethics Supervisor's determination regarding a potential violation of the Executive Branch Ethics Act was arbitrary.

Ombudsman Linda Lord-Jenkins issued formal Notice of Investigation to Commissioner Tom Irwin on March 5, 2007. Assistant Ombudsman Tom Webster investigated this complaint with assistance from research assistant Elizabeth Lusk.

BACKGROUND

Division of Mining, Land & Water and Division of Forestry (A2006-0546 and J2006-0165)

An Interior resident contacted the ombudsman on May 8, 2006, to complain that DNR employees in Fairbanks and Tok had acted improperly with regard to a parcel of land in Tok that the complainant had attempted to purchase. [Ombudsman's Note: The resident will be referred to as Complainant A in this finding to protect the complainant's confidentiality as per AS 24.55.160.]

Complainant A visited the DMLW office in Fairbanks in April 2006 to inquire about purchasing parcel ADL 406526 in Tok, which had been available for sale over-the-counter since June 1, 2005. On Friday, April 21, Complainant A asked several questions about the parcel—access, improvements on neighboring parcels, abandoned improvements on the subject parcel—and DMLW staff at the Public Information Center (PIC) recommended strongly that Complainant A inspect the property before buying it. Complainant A agreed and asked a friend in Tok to inspect it over the weekend.

Complainant A returned to DMLW the following Monday afternoon, April 24, to purchase the parcel and learned it had been sold earlier in the day to two Division of Forestry employees in Tok. The complainant said this seemed “too coincidental,” because Complainant A recalled that the DMLW employee who assisted Complainant A had said the parcel was “a good deal” and would be valuable once construction began on a natural gas pipeline near Tok. The complainant speculated that this employee might have contacted the Forestry employees to let them know this parcel was about to be sold.

Complainant A complained to Fairbanks DMLW supervisor Chris Millis on April 26. Complainant A said Mr. Millis responded “two DNR firefighters” had purchased the parcel by faxing in an application Monday morning, April 24. Mr. Millis said he had spoken with Clinton Northway, the Acting Manager for Forestry in Tok, who “said the two men had been looking for land in the Tok area.”

Complainant A was dissatisfied with this response and complained to the ombudsman that DMLW's handling of the land transaction appeared to be improper. The complainant also wrote that there appeared to have been a violation of the EBEA. Complainant A believed the Forestry employees "used State of Alaska equipment for personal gain by submitting their application using the fax machine from the Tok DNR office." Complainant A enclosed a copy of "State Policy Regarding Personal Use of State Office Technologies," with the following passage highlighted:

The Executive Branch Ethics Act states a public employee may not "use state time, property, equipment, or other facilities to benefit personal or financial interests" (AS 39.52.120(b)(3)).

Based on the information the complainant provided, the ombudsman investigator opened two complaints—A2006-0546 against DMLW and J2006-0165 against the Division of Forestry.

Regarding the complaint against DMLW, the ombudsman investigator talked with Mr. Millis and the two other staff who interacted with Complainant A in April 2006. Mr. Millis had no first-hand knowledge of this transaction, but confirmed that the Forestry supervisor in Tok told him on the telephone he was aware that the two state workers there had been looking for property to buy.

According to Mary Gleason, who supervised the Fairbanks PIC, on Monday, April 24, a Forestry technician from Tok called Fairbanks DMLW at about 10 a.m. to say he wanted to purchase the parcel. At 12:41 p.m. he faxed an application, co-signed by another Forestry technician in Tok, to the Department of Transportation and Public Facilities office in Fairbanks, apparently by mistake. DOT/PF forwarded the fax to Fairbanks DMLW at 1:23 p.m. When the debit card deposit cleared, DMLW took the parcel listing off the Internet and forwarded the paperwork to Anchorage for processing. Complainant A arrived at the PIC later that afternoon after getting off work at 3 p.m. Ms. Gleason said she told Complainant A the parcel had been sold earlier in the day. She said Complainant A seemed disappointed. Ms. Gleason said it is not unusual for someone to purchase land and for someone else to come in soon afterward to purchase the same parcel.

The employee at the PIC who assisted the complainant on Friday, April 21 was Natural Resources Manager A. J. Wait. The ombudsman investigator discussed this complaint with Mr. Wait in considerable detail and concluded that he did not "tip off" the two men in Tok about the impending sale of the parcel. Mr. Wait expressly denied doing that and denied knowing the buyers of the parcel. He said intervening in the sale process would have been unethical, and he would not jeopardize his career with DNR by engaging in unethical conduct. When the investigator talked with him, Mr. Wait did not recall telling Complainant A the parcel would increase in value if a pipeline is constructed nearby. However, he said, he managed the PIC before Mary Gleason took over that responsibility, and he had observed that land values have been rising over the past several years. For that reason, he said, the fact that the parcel had last been appraised a few years before suggested to him that the sale price was probably a good value.

Mr. Wait said many prospective land buyers are inexperienced, and PIC staff try to assist them by providing information. At the same time, he said, PIC staff usually have not seen the property in question, so their standard advice to prospective purchasers is to inspect the property before they commit to purchase it. Ms. Gleason also said it is standard procedure to advise prospective buyers to inspect parcels before buying them. Ms. Gleason and Mr. Wait said Complainant A had questions about the parcel that they could not answer—for example, what type of access there was to it, whether there were any structures or trash on it, and whether there was a power plant located nearby.

DMLW employee Jeanne Proulx provided the ombudsman documentation showing the parcel in question was offered for sealed bidding in the spring of 2005, and when no one bid on it, the parcel became available for over-the-counter purchase on June 1, 2005. Ms. Proulx provided a DNR policy reminder dated April 6, 2005, from Deputy Director Dick Mylius on over-the-counter land sales:

Today is the start of the application period for the Spring 2005 Alaska State land offering – Auction #435. The Division of Mining, Land & Water is offering over 150 surveyed parcels in various locations throughout the state.

DNR employees are welcome to participate in this land sale program. Brochures are available for free at the Public Information Offices in Anchorage, Fairbanks, and Juneau.

DNR regulations (11 AAC AAC 67.005) say that a state employee “who gained knowledge of the disposal area at state expense, or who was in a position to obtain inside information about the disposal process” may not file an auction bid or an application during the last 15 days of the application period.

It is important to maintain public confidence in the integrity of the disposal program. Therefore the Department’s policy is that ALL DNR employees should abide by the regulation. We know that most DNR employees do not have any inside information or knowledge, but the public is not aware of who does or does not have access to this information. . . .

11 AAC 67.005(c)(2) prohibits DNR employees from purchasing state land “within the first 30 days that it is offered over the counter.” When the Forestry employees purchased the subject parcel, it had been available to the public over the counter for nearly 11 months.

Regarding the complaint against the Division of Forestry employees, the ombudsman investigator obtained copies of the sale documents, including the faxed forms with printed datelines, and compared times with the employees’ timesheets, obtained from the Division of Personnel. The transaction took place during state agency business hours on Monday, April 24. The timesheets documented that both Forestry employees worked during those hours on that date.

On June 20, 2006, the ombudsman investigator mailed these documents to DNR DES Dan Saddler and asked him to review them in light of provisions in the EBEA. On July 12 the ombudsman investigator e-mailed Mr. Saddler asking if he had received the documents but received no reply. On July 18 the investigator left a phone message for Mr. Saddler, whose phone message said he would be away from the office July 14 to July 25.

On July 28 the investigator left another message for Mr. Saddler. On the same day, the ombudsman investigator e-mailed a message to the Ethics Attorney in the Department of Law, Assistant Attorney General Judy Bockmon, expressing concern that DNR did not appear to have an active designated ethics supervisor:

There may or may not have been an ethics violation, but until someone designated to perform that evaluation actually does so, I have no way of reporting back to the citizen that [the citizen’s] concerns have been reviewed by the appropriate authority.

Ms. Bockmon responded on July 28,

. . . I have only been in this position for several months, but my predecessor found Mr. Saddler to be one of the most thorough of the ethics supervisors in addressing ethics matters.

You are correct that many ethics matters are first addressed by agency or board ethics supervisors, typically when an agency employee submits a notice of potential violation to the designated ethics supervisor to address a potential problem in advance or present a concern or complaint about another employee's conduct. However, the Act also provides for persons to file complaints directly with the Attorney General, which then come to me for review and action under the procedures set out in AS 39.52.310 -.390. This process may take some time depending on the circumstances.

On the same day, July 28, 2006, the ombudsman investigator replied to Ms. Bockmon:

The Office of the Ombudsman routinely refers complainants to grievance and appeal processes and frequently monitors the results for fairness and reasonableness. It sometimes happens that such processes do not work well. In this case I have a complainant who has been waiting several weeks to know whether I think the matter has been addressed appropriately. I can't even tell [Complainant A] that the designated ethics officer has received [the] complaint. That seems unreasonable. It runs contrary to the purpose of the program, which is to foster public trust in state government.

The Ombudsman has on many occasions investigated ethics complaints without referring them to the process set out in the Executive Branch Ethics Act. I had hoped to see that these cases would be handled promptly and fairly at the departmental level.

On July 28 Ms. Bockmon replied that she had left a message for Mr. Saddler. She continued,

I agree that it is important that a citizen's complaint about a state matter be addressed as promptly as possible under the circumstances. Not knowing what we are talking about I can't really address how this complaint fits in the process. It is more than likely one of a number of ethics matters Dan has on his desk to review, investigate and analyse before making a determination.

On Friday, July 28, Mr. Saddler telephoned the ombudsman investigator at 4:30 p.m. to apologize for the delay. He said he would complete his review of the complaint as soon as possible. The ombudsman investigator told Mr. Saddler the ombudsman had received a second ombudsman complaint against DNR employees alleging a potential violation of the EBEA. Mr. Saddler said he would be glad to review that complaint also.

On July 31, 2006, Mr. Saddler wrote to the ombudsman investigator:

From the facts and information you present, it appears that the two Tok-based forestry technicians did commit technical violations of [Alaska Statute] 39.52.120(b)(3) by using state time and equipment to do personal business. However, there is a state regulation which provides that there is no violation if the designated ethics supervisor determines that the use of time or equipment was insignificant. In its entirety, it reads:

9 AAC AAC 52.050. USE OF STATE TIME, PROPERTY, EQUIPMENT, OR OTHER FACILITIES. A public officer who uses state time, property, equipment, or other facilities to benefit the officer's personal or financial interest is not in violation of AS 39.52.120 (b)(3) if the officer's designated supervisor determines that the use is insignificant, the attorney general has not issued a general opinion against the use, and the attorney general does not advise the officer against the use.

It would be my determination as DNR ethics supervisor that the phone call and fax transmission in support of the land purchase was not a significant use of state time or equipment. This is based on the facts you presented to me, and on the statement from

their supervisor that the two did not habitually use state time or resources for personal benefit, or violate office policy permitting de minimis use of state equipment for personal purposes.

If I were to determine that this action had not been insignificant, the state executive ethics laws and regulations provide for a range of possible sanctions. If the attorney general (or his designated assistant attorney general) believed there was a knowing violation of state ethics laws, he could initiate a separate process, which could lead to various sanctions, including disciplinary action, or even criminal prosecution.

As you suggested, the best way to avoid such situations in the future is to ensure that all parties understand the law. I will accordingly have the supervisor of the DNR office in question remind his employees that state law prohibits them from using state equipment or time for personal interests.

Based on this response and his own previous investigation of the complaint, the ombudsman investigator closed the two ombudsman complaints as having been dealt with appropriately by the DES and wrote to the complainant:

I am writing to follow up on our telephone conversation last month. As I explained then, the designated ethics supervisor for the Department of Natural Resources took longer than I expected to investigate your complaint and report back to me. He completed his investigation early this month, and I can now provide a little more information than I was able to give you when we last spoke. ...

From my own review and the results of Mr. Saddler's investigation, it appears that DNR has now followed up on your complaint in a reasonable manner. I found no evidence to suggest that Fairbanks PIC staff acted improperly or that the conduct of the Forestry employees in this matter was more serious than Mr. Saddler concluded. I encouraged Mr. Saddler to inform DNR supervisors of the provisions of the Ethics Act and of his availability as designated ethics supervisor to advise agency staff on potential conflicts of interest. ...

Division of Parks and Outdoor Recreation (J2006-0583)

On May 17, 2006, the Office of the Ombudsman received an inquiry from a citizen whether it was improper under the EBEA for the Division of Parks and Outdoor Recreation, Northern Area, to rent a forklift owned by the family of an employee, Mike Sullivan, who was maintenance supervisor for the division's Fairbanks office at the time. The caller said Mr. Sullivan's family owned a private construction business in Fairbanks. The ombudsman investigator opened a complaint against the Division of Parks and Outdoor Recreation (J2006-0583). The caller requested that the ombudsman maintain confidentiality as to the caller's identity in accordance with AS 24.55.160(b).

The ombudsman complainant said Mr. Sullivan resigned from his position as maintenance supervisor not long after the rental took place to work for the construction company owned by his family. In July 2006 the complainant obtained a copy of an "Invoice" for this rental from Sullivan Brothers Construction of Fairbanks. The invoice is dated June 10, 2005, and reads, "Rental of VR-90 Forklift. One day @ \$250.00/day. Total amount due \$250.00." The invoice does not give the date the equipment was used. The person reporting this transaction alleged the rental occurred before Mr. Sullivan left the state's employ sometime in May 2005. The invoice was approved by Mr. Sullivan's supervisor, Northern Area Superintendent Anna Plager, who signed it for payment on June 28, 2005.

The complainant said there was a witness to a discussion of this rental between Mr. Sullivan and Ms. Plager during which Mr. Sullivan suggested that Ms. Plager should put his brother's name on the division paperwork to avoid the appearance of a conflict of interest. The "Jobsite" and billing addresses on the invoice are the same. The complainant said "the exact same piece of equipment" was available for rent at three or four equipment rental businesses in the Fairbanks area.

As noted above, on July 28, 2006, the ombudsman investigator told DNR DES Dan Saddler that the ombudsman had received a second report of a potential violation of the EBEA, and the DES had said he would be glad to review it. On July 31, 2006, Mr. Webster wrote a letter to Mr. Saddler giving the information set out above and asking,

Can you check your records to see if Mr. Sullivan filled out an Ethics Disclosure Form for this rental? If so, please provide me a copy. If not, please review the circumstances of this rental to ensure that it was properly documented in division files and to evaluate whether there was a violation of the Executive Branch Ethics Act. . . .

On August 25, 2006, the ombudsman investigator sent an e-mail message to Mr. Saddler inquiring about the status of his review of the potential violation of the EBEA. Mr. Saddler did not reply.

On October 19, 2006, the ombudsman investigator telephoned Mr. Saddler to inquire about the status of his review. Mr. Saddler apologized for "not getting to it." The ombudsman investigator remarked that Mr. Saddler had had the complaint for two-and-one-half months. Mr. Saddler said he had been busy and would "get to it right away."

On October 30, 2006, Mr. Saddler left a voice-mail message for the ombudsman investigator stating that he had "made a couple of inquiries into the forklift rental" and learned that "Sullivan resigned effective April 15, 2005, a month or more before the invoice date." "It looks like the ethics complaint won't hold water," he said. This "could change with more details," he added.

In an e-mail message the same day, October 30, the ombudsman investigator asked Mr. Saddler to document the information he had provided:

The forklift rental complaint hinges on the complainant's allegation that the fork lift rental occurred before Sullivan's separation date and thus constituted a conflict of interest.

Surely DNR records show what date the forklift work was actually performed? I understood it was used to hoist roof supports for a building at the DNR compound in Fairbanks. The June 10, 2005 invoice does not give the date the service was performed. If DNR lacks such basic accounting information, there is a larger problem here.

If the documented date of service postdates Sullivan's separation from SOA employment, the amount involved is small enough that it's probably not worth pursuing. But the allegation is that Sullivan and Plager discussed this rental while Sullivan was employed by DNR and that the rental took place prior to his separation date. If DNR can't document the date of the rental it paid for in June 2005, someone should ask why. Do they fail to document other services they pay for? Doesn't state law and DNR policy require such documentation? It should be simple to get to the bottom of this.

On October 30 Mr. Saddler faxed to the ombudsman investigator a copy of an e-mail message dated March 18, 2005, from former DNR DES Nancy Welch reminding all DNR employees that they were required to file an ethics disclosure statement if they wanted to buy or rent supplies or services from a department employee or his relatives. In that message Ms. Welch wrote,

Please be aware of the following DNR procurement policy:

To avoid the appearance of any conflict of interest, DNR employees and immediate members of DNR employees' families may not sell or contract with DNR for supplies or services. . . . [italics in original]

Requests for waivers of this policy may be submitted by the employee through the Director, Support Services Division, to the Commissioner for a decision.

A digital file of an ethics disclosure form (grants_contracts_notification_form.pdf) was attached to the message.² On the fax cover sheet Mr. Saddler wrote, "We do not have any record of a contract disclosure form from Mike Sullivan re: forklift."

On November 2, 2006, Mr. Saddler set out the results of his investigation in an e-mail message:

I'm following up with answers to your questions regarding the rental of a forklift at the DNR office in Fairbanks, referenced in your July 31, 2006 letter to me regarding complaint A2006-0583.

I spoke with Ana [sic] Plager, the Northern Regional parks superintendent in the Division of Parks and Outdoor Recreation on several occasions in October and early November. She said that Mike Sullivan was the chief of maintenance for the DPOR's Northern Region, until he resigned, with his last day of work being April 14, 2005.

Plager said that the project in question involved moving a serviceable roof from an old pole barn to the walls of a new maintenance shop, a project that had been long awaited and anticipated at DNR. She recalls talking with Mike Sullivan about the kind of equipment needed for the job – a "Zoom Boom" telescoping forklift/crane – and about Mike's claim that could get it at a good price from his brother's company, Sullivan Brothers Construction. Plager agreed to rent the gear from Sullivan Brothers because Mike Sullivan knew the equipment and the project needs, they were both eager to get the work wrapped up before he left, and that the price of \$250 for four hours rental, plus an operator (Mike), was a good one. She rejects the claim that she conspired with Mike to somehow conceal the fact that he had a private interest in the rental contract with Sullivan Brothers, as it was not clear to her that Mike was a partner in that business. She said Mike has nine brothers, many of them in the construction business.

While Plager had first recalled that the work was done after Mike Sullivan had separated, more research, including consulting with other maintenance workers, and reviewing a maintenance log, showed that the work was actually performed on April 13, 2005, the day before Mike left state service. Plager said Mike did not file any contract disclosure form, and I have no record of any such form being filed with the DNR ethics supervisor at the time. As we discussed earlier, I have sent you a copy of an email to all DNR

² The DNR procurement policy referenced in Ms. Welch's e-mail reads as follows: "1.8.1. Contracting with State Employees. To avoid the appearance of any conflict of interest, DNR employees and immediate members of DNR employees' families may not sell or contract with DNR for supplies or services. This policy is not intended to limit employees from contracting or doing business with other State agencies provided that business or outside employment is not incompatible with, in actual conflict with, or appears to be in conflict with the proper discharge of the employees' duties (2 AAC 07.940) and that the appropriate paperwork is on file with the Department Ethic's [sic] Officer. Requests for waivers of this policy may [be] submitted by the employee through the Director, Support Services Division, to the Commissioner for a decision" ("Procurement Policies and Procedures"). DNR rescinded this policy effective August 28, 2007.

employees, dated March 18, 2005, reminding them of the departmental policy prohibiting them from contracting with the department.

In essence, Ana [sic] Plager and Mike Sullivan agreed that their Division would enter an equipment rental contract with a local company for \$250 for four hours of work. Sullivan did not disclose that he had a private interest in the company, and Plager did not know he had such an interest until after he had left state service. My assessment is that Mike Sullivan is culpable for violating departmental policy against employees contracting with the department. As he is no longer a state employee, there is no point in pursuing an ethics violation complaint against him. Ana [sic] Plager is somewhat culpable for not ensuring the rental contract fully complied with DNR policy. However, I find that her culpability does not rise to the level of significant violation, given the relatively small cost and high value of the rental deal, the desire of her staff to complete an important job before Sullivan's departure, and Sullivan's failure to make clear his personal interest in the rental.

If I do receive a formal complaint under the ethics act regarding this matter, I am not likely, absent new information, to recommend any disciplinary action against Plager. I will, however, take this opportunity to distribute to all DNR employees another reminder of the departmental policy prohibiting them from contracting or leasing with the department.

On November 16, 2006, the ombudsman investigator requested a copy of Mr. Saddler's file on this ethics complaint and the ombudsman sent an Anchorage ombudsman employee to copy the file. Mr. Saddler said his file consisted entirely of materials the ombudsman investigator sent him.

On November 17, 2006, the ombudsman investigator wrote by e-mail to Mr. Saddler to be sure the DES had thought to provide everything he had documented about the complaint:

I received the documents you gave to Chelsea Ricker of our Anchorage office yesterday afternoon. It consists mostly of information I sent you, including a copy of the invoice Ms. Plager approved for payment in June 2005, two months after the forklift work was performed. Do you have any other documentation for this complaint?

For example, there is no documentation for much of the information in your November 2, 2006 e-mail message to me reporting the results of your review. Do you have notes or documentation on your phone conversations with Anna Plager in October and November 2006? on the date the work was performed, the extent of it, and any agreement between her and Mr. Sullivan prior to it being performed? or on Mr. Sullivan's alleged termination date? Your account of what Ms. Plager told you has some inconsistencies that I was hoping your notes would clear up. Did the Division of Parks and Outdoor Recreation document the work Mr. Sullivan performed with the forklift rented from his family's construction business on April 13, 2005? In light of the Ethics Act, does it matter that Ms. Plager thought Mr. Sullivan's brothers owned the forklift? Did the \$250 Ms. Plager told you she authorized for forklift rental, plus an operator (Mike), include payment for his services while he was simultaneously on the state payroll? Was there a written contract? Did this expenditure conform with standard DNR procedures for spending State of Alaska monies?

You said neither Mr. Sullivan nor Ms. Plager filed an ethics disclosure form. You also said Ms. Plager first recalled that the work was done after Mike Sullivan had separated, but more research revealed it had been done before he left. She also stressed to you how important it was that the work be done before Mr. Sullivan left the state's employ, because this was a project that had been long awaited and anticipated at DNR. Does it

seem likely to you that Ms. Plager forgot the urgency of getting this project done before Mr. Sullivan terminated, as she appears to have claimed when you first asked about it?

Please send me any other documentation of any kind that you created or obtained in relation to this ethics complaint, including e-mail, memoranda, correspondence, phone logs, handwritten notes, documents, receipts, work orders, maintenance logs, state warrants as payment for services, photographs, tape recordings, etc.

I would also like to see documentation of any directive or personnel action DNR took in advising Ms. Plager that she did not follow the instructions explicitly set out some three weeks before this rental in Nancy Welch's March 18, 2005 e-mail message to all DNR employees on the subject, "Employees contracting with DNR for professional services, sale or lease of items."

Also, do you have written guidelines, other than those in statute and regulation, that you follow in your work as designated ethics supervisor for DNR? If so, I would like a copy. And do you have documentation that the commissioner delegated to you his responsibility as the department's designated ethics supervisor under AS 39.52? Do you discuss ethics concerns with the commissioner? Did you discuss this incident with the commissioner or the ethics attorney?

Mr. Saddler did not reply to this message.

Interviews

Dan Saddler, Designated Ethics Supervisor, Department of Natural Resources

The ombudsman investigator interviewed DES Dan Saddler on November 28, 2006.

April 2005 Fork-lift Rental

Mr. Saddler said he had no documentation of his handling of the fork-lift rental ethics report other than those he provided to the ombudsman investigator, which, with the exception of a fax cover sheet and a one-page e-mail by former DNR DES Nancy Welch, consisted of documents the investigator had provided Mr. Saddler. Mr. Saddler said he had destroyed phone notes he took when discussing the matter with Superintendent Anna Plager and had deleted e-mail messages he exchanged with her. He said he had no record of his investigation other than his November 2, 2006 e-mail message to the ombudsman investigator.

Mr. Saddler said he took notes about his telephone conversations with Ms. Plager on his computer, and then edited out everything except what he e-mailed to the ombudsman investigator. He likened this practice to "sculpting a piece of stone" by chipping away pieces until it assumes the desired form. He said he did not keep a back-up copy of his original notes.

Mr. Saddler said his usual method of documenting his work as DES was to take notes on a keyboard and then "use that structure" to write a report. He said his experience as a reporter taught him that "you don't want to have a lot of notes following you." He said he put the important details into "the story." "If it's worth keeping, it's worth putting in the story," he said. "If it's not going to be put in the story, there's no reason to keep it."

Mr. Saddler said Ms. Plager initially told him the rental took place on May 1, 2005, after Mr. Sullivan had left state service. A few days later she told Mr. Saddler she had looked into the matter further and had refreshed her recollection of what happened. He said she "found out that a temporary employee, or seasonal employee, actually came back sooner this year [i.e., 2005], or stayed later, I forget which it was." Mr. Saddler said this new information led him to understand that the work had in fact taken place before Mr. Sullivan's last day as a state employee, and this

had caused Mr. Saddler to revise his determination as DES that the rental did not violate provisions of the EBEA.

Mr. Saddler said he understood Ms. Plager to have told him this was a long-standing project to move a roof from an old structure to a new maintenance shed. He said Ms. Plager told him Mr. Sullivan wanted to complete the project before he left. To do this, Mr. Saddler said, "they needed a piece of gear, Mike had experience with the gear and knew where he could get it at a good price." Mr. Saddler said he thought Mr. Sullivan was "culpable" for not using the ethics disclosure process to make clear his relation to his family's construction firm. He said Ms. Plager was "less culpable" because "she was taking her maintenance chief's word" that this would be a good way to accomplish the task promptly at minimal cost to the agency.

Mr. Saddler said that although he had reported to the ombudsman investigator that Ms. Plager recalled she and Mr. Sullivan considered the project important enough to expedite renting the fork-lift before Mr. Sullivan's last day on the job, Mr. Saddler's overall impression was that Ms. Plager had told him she did not remember that she considered it important to get the work done before Mr. Sullivan's last day on the job. "I think that's something she just didn't remember," he said, adding that Ms. Plager may have emphasized this more in one conversation than another.

Mr. Saddler said Ms. Plager told him "it wasn't really clear to her that Mr. Sullivan had an interest" in Sullivan Brothers Construction. She said she "knew he had a lot of brothers in the construction business," so it did not occur to her that there would be potential for a conflict of interest. Mr. Saddler said he understood that family relationships are expressly provided for in the EBEA. He said that because he did not have records of his communications with Ms. Plager, he could not say for sure whether Ms. Plager understood there might have been a conflict of interest in renting equipment from her subordinate's family. He acknowledged that "contemporaneous notes would be good," but he was "not sure what level of precision is required" in evaluating potential violations of the EBEA.

Mr. Saddler said he had no notes or phone logs showing when he made calls to or received calls from Ms. Plager, and he obtained no documentation that would have verified Ms. Plager's recollection of what happened, such as the maintenance log showing the date on which the work was performed or a personnel record of Mr. Sullivan's termination date.

Mr. Saddler said he talked to Ms. Plager about the e-mail message his predecessor as DES, Nancy Welch, had sent to all department employees just a few weeks before the fork-lift rental occurred reminding them to be alert to potential conflicts of interest in contracting for services or goods with department employees. Mr. Saddler said Ms. Plager told him she thought there was "another issue in a different section of the department" that prompted Ms. Welch's e-mail reminder. "It was about someone else who leased a piece of equipment to the Division of Forestry, and it broke, and there was a claim for damages or repairs." Based on this recollection, Mr. Saddler said, he "believed" he had discussed Ms. Welch's ethics reminder with Ms. Plager.

Mr. Saddler acknowledged that Ms. Plager appeared not to have complied with a directive from the previous department DES that DNR staff not enter into contracts with department employees or their families. That directive came out less than a month before Ms. Plager approved a rental contract with Sullivan Brothers Construction. Asked whether his investigation had led him to believe that Ms. Plager ignored the requirements of the EBEA to get a job done, Mr. Saddler defended her as "a pretty good actor." He said Ms. Plager "is pretty diligent about things and has a good reputation. She hasn't cut corners elsewhere to my knowledge."

Ms. Saddler said the \$250 expenditure for work that was actually performed might seem minor, but should be looked at systemically. "If it's done this way for \$250, what if you change the

circumstances—say it's \$25,000—what procedures were taken to verify that it was done properly?"

Mr. Saddler said he discussed this ethics matter with his supervisor, Deputy Commissioner Ed Fogels, but said he was "not sure what his disposition of that information has been." Mr. Saddler said he did not think his determination as DES on this report of a potential violation of the EBEA had become part of Ms. Plager's personnel record.

Mr. Saddler said he did not report the results of his review of either of the two potential violations of the EBEA to the Ethics Attorney in the Office of the Attorney General, despite having found in both instances that DNR employees had violated the EBEA.

Ethics Training for the Designated Ethics Supervisor

Mr. Saddler said he received no training when he assumed responsibility as DES for DNR. He said he had no written guidelines to follow when investigating reports of potential violations of the EBEA.

Mr. Saddler said it would be a good idea to issue an annual ethics reminder to department employees, and also to do that when there is a change of administration, reminding staff that the EBEA requires disclosure of gifts, contracts, travel, and outside employment or services. He suggested that a group of commissioners' special assistants, called "special assistants for communications" or "SACs," who meet to discuss issues of importance to the administration, might be an appropriate venue for distributing information about the requirements of the EBEA.

Mr. Saddler said it was his understanding that every new DNR employee is given a copy of the ethics video produced by the Department of Law. He said they are "told to watch it, and if you have any questions, ask." "That's about the extent of the formal ethics training" for department employees, he said. Mr. Saddler said he would welcome a training workshop for DES's and a set of written guidelines for exercising that function. He said, for example, it would be helpful to have written standards for record keeping. He said the complaint regarding DPOR convinced him of the importance of keeping records on potential violations of the EBEA—because an ethics supervisor should be able to "provide evidence that supports" a determination.

Mr. Saddler's offer to obtain documentation

Mr. Saddler said he would try to obtain back-ups of his e-mail correspondence with Ms. Plager and phone records showing dates on which they talked and the duration of those calls. The ombudsman investigator suggested that Mr. Saddler should ask Ms. Plager for copies of her records of their conversations. Mr. Saddler suggested that Ms. Plager's records might not be complete: "How do I trust that she's given me all of it there was?" The ombudsman investigator reminded Mr. Saddler that he had personally vouched for Ms. Plager's integrity earlier in the interview. Mr. Saddler suggested that a good policy would be "trust, but verify."

*

On May 14, 2007, Deputy Commissioner Richard LeFebvre enclosed with a letter of that date to Ombudsman Linda Lord-Jenkins two pages documenting e-mail messages between Mr. Saddler and other persons regarding back-up records of telephone calls and e-mail correspondence between Mr. Saddler and Ms. Plager.

On November 28 or 29, 2006, Mr. Saddler asked DNR central office staff about obtaining telephone logs and deleted e-mail correspondence documenting his investigation of the DPOR ethics complaint. On November 29, 2006, DNR Executive Secretary Shannon Devon wrote to him that it was unlikely such records could be retrieved:

I am responding to your request to retrieve emails and phone records from earlier this year. Our department does not have the capability to retrieve specific phone number records. the only recommendation we have is to retrieve the hard copy of phone bills from your finance division and to manually pull the records. Sorry there was not an easier method.

Enterprise Technology Division staff member should be calling you to find out more information regarding the email retrieval query. However, it sounded like it was likely they would not be able to retrieve email messages.

Mr. Saddler annotated the print-out of this message, "ETS [Enterprise Technology Services] said in phone call it was not possible—too late." (The annotation is not dated but appears to document the second of the e-mail messages reproduced below.)

On December 5, 2006, Mr. Saddler wrote by e-mail to Department of Administration (DOA) Systems Programmer Jay Druyvestein:

We spoke last week about my request to DOA to retrieve copies of some emails that I sent to another state employee. . . . here's my request:

I would like to get a record of, and preferably an electronic copy of, all email traffic between me [e-mail address] and Ana Plager [e-mail address], for the period June 1, 2006 to the present. I would prefer that you not contact her about the matter, and if this creates any difficulties in fulfilling my request, please contact me before initiating the task. . . .

On December 8, 2006, DOA Systems Programmer Luke Kreuzenstein wrote to Mr. Saddler,

As we discussed on the phone, our available data is too limited to fully comply with your request. We generally do not store message content more than 5 days after it has been deleted from a recipient's mailbox on the central email servers. That is backup data intended for disaster recovery purposes and not for archival storage.

We do have logs documenting message transport which we retain for roughly six weeks. These logs do not contain message content, just Date, Time, Sender Address, Destination Address, and Subject Line. The logs we normally keep handy for troubleshooting plus what I was able to restore from backups cover the period from October 3 through December 7. I also found one additional log file covering September 5 through September 12. I searched the 10 week's of log data using a couple different techniques. I found records for plenty of messages to or from [e-mail address], and I found records for plenty of messages to or from [e-mail address], but I did not find record of any messages between these two addresses in either direction (zero).

It may be worth mentioning that after messages are deleted from the central email servers, they may still exist and remain available, stored by the email client(s) on user's computers or on DNR-managed file servers. This was the case in some recent investigations you have heard about. . . .

There is no evidence that Mr. Saddler checked further into what records might still reside on DNR file servers or on individual computers, nor did he communicate to the ombudsman the results of his efforts to obtain documentation of his contacts with Ms. Plager.

Penny Beiler, Senior Management Consultant, Division of Personnel³

The ombudsman investigator interviewed Human Resource Specialist IV Penny Beiler. Ms. Beiler is Senior Management Consultant in the Division of Personnel. She has worked for the State of Alaska for more than 30 years, including service with the University of Alaska, the Alaska Human Rights Commission, the Governor's Office, the Alaska Energy Authority, the Oil Spill Coordinator's Office, and the departments of Labor and Education. In her time with the Division of Personnel she has provided management consulting services for the departments of Administration, Commerce, Education, Labor, Law, and Revenue. Currently, she supervises a team of consultants that provides personnel and management services for the departments of Environmental Conservation, Fish and Game, and Natural Resources.

The Personnel Division's Internet Web site describes the mission of the Management Services section:

Management Services is the first point of contact for supervisors and managers who are dealing with or confronting personnel or employee relations issues. Management Consultants coach supervisors and managers through the various personnel and employee relations processes.

Ms. Beiler said ethics training for new state employees occurs during orientation when the new employee goes through a self-directed orientation using a six-section orientation Web site hosted by the Division of Personnel. The Web pages link to employment/enrollment forms and other state sites, including the Department of Law Ethics Web page. When the new employee has read these materials, the supervisor and the employee go through a checklist together to be sure the necessary forms have been completed and to review information and answer any questions the new employee might have. "Hopefully, the supervisor is doing a good job explaining the Ethics Act," Ms. Beiler said. She said her division asks departments to give the new employee at least two hours to go through the orientation pages.

Ms. Beiler said employees with ethics questions or complaints can contact their DES or they can call the division's employee call center, part of Management Services, and talk to someone on staff who would "walk them through the process." Ms. Beiler said there are currently more than 14,000 state employees in the executive branch, including more than 2,000 supervisors. Every year before July they get a reminder by e-mail and a form on which to disclose outside employment for the coming fiscal year. These forms are screened for potential conflicts of interest. Ms. Beiler pointed out that most state employees do not receive gifts from lobbyists or participate in contracting, so some provisions of the EBEA would not normally apply to them, though these provisions might apply to supervisors and managers.

Ms. Beiler described the "supervisor academy" training program offered by the division at regular intervals in Juneau, Anchorage, and Fairbanks, and less often in outlying areas. The academy is a five-day training session for supervisory staff. The curriculum for the training sessions evolved under the direction of the current Workforce Development Manager, Jackson Steele. Ms. Beiler said the program covers "all aspects" of what supervisors and managers need to know to be effective managers. Ms. Beiler said the training program requires "a huge commitment in time," but is worthwhile because it provides supervisory personnel "everything a supervisor would need to know and have in their bag of tricks to be successful." One component of that training, she said, is ethics. Ms. Beiler characterized the training as "very intensive," requiring reading at night, exercises and quizzes, and follow-up with trainees afterward about what they learned. The curriculum materials include films, books, and materials in a binder, and cover a wide variety of topics, including contracts, personnel rules, performance management, and other aspects of supervising state employees.

³ Ms. Beiler has since retired from State service.

Ms. Beiler said the training curriculum has changed significantly in the past several years, and the trainers are now certified in their subjects. She said the curriculum was designed by a development team working with “subject matter experts.” Trainers first experience the training as participants and then receive coaching and critiques as they learn to present the material effectively. Ms. Beiler said this program is a “tenfold” improvement on previous State supervisory training programs. She said when the division’s learns that a supervisor is “weak in a certain area, that’s the recommendation that we make: we put people into training.”

Ms. Beiler said her Management Services team investigates potential Ethics Act violations. She said if a manager or supervisor contacts her requesting an investigation, her team investigates and then turns the resulting information over to the Designated Ethics Supervisor for further evaluation or reporting to the Attorney General’s Office. Ms. Beiler said many personnel investigations turn up something that suggests an ethics issue is involved as well. In such cases, the investigator informs the employee’s supervisor or the ethics supervisor for the department. “Sometimes they do the investigation, and sometimes we broaden our investigation to include the ethics piece,” she said. Management Services then turns that information over to the DES or to the manager who must decide what remedial action should be taken.

The ombudsman investigator asked Ms. Beiler whether, in light of her experience, the formal complaint process set out in the EBEA (which requires a sworn, written complaint that is then shown to the subject of the complaint) might act as a disincentive to report an ethics violation in some circumstances—for example, if a state employee thinks a supervisor has done something that might be a violation of the Ethics Act. Ms. Beiler said employees might hesitate to report a potential violation if they think a written complaint “with their name on it is going to end up on the supervisor’s desk.” But, she said, “That’s not going to happen when we do an investigation.”

Ms. Beiler said an employee with ethics concerns can contact the department DES directly but added, “I’m not sure how many rank-and-file employees know who the ethics supervisor is for their department.” She pointed out, moreover, that DES’s tend to be high-level officials who have other important duties that might occupy their attention or insulate them from lower-ranked employees. How well they perform the duties of DES probably depends, she said, on their experience and knowledge of Human Resources principles. “They may collect the ethics forms and send out the e-mail reminder every year, but that is a small portion of the Ethics Act.” On the other hand, she said, Management Services regularly deals with performance management issues and investigations that sometimes involve other aspects of state law, such as the Ethics Act and Equal Employment Opportunity law. “A lot of other things come into play when we do investigations,” she said.

Ms. Beiler said Management Services does not require people to submit a sworn, written complaint. “Someone can come to us and tell us,” she said, “or a regular personnel investigation might have an element of ethics in it.” If it does, she said, “We pursue that, and we contact the ethics supervisor.” If the outcome of a personnel investigation suggests there has been an ethics violation, the DES would report that to the Attorney General’s Office.

Ms. Beiler said she sometimes has received calls from ethics supervisors in the three departments she supports to tell her, “Something has come to my attention internally, it looks like it may involve an ethics violation, and I’d like you to do an investigation.” She said she interviews people who may have information about the matter but maintains as much confidentiality as the situation permits. “I don’t turn over my notes to the person that we’re investigating,” she said, “and I don’t let them know what’s going on, necessarily.” She said she conducts a “very confidential, very informal investigation, just like I would do for a contract violation or any other kind of problem” brought to her attention. She said she reports to the DES the information she uncovers about violations of the Ethics Act during the course of a personnel investigation.

Ms. Beiler said Management Services does not give a written statement to the subject of the complaint. "I talk to the appropriate parties, tell them I'm looking into a confidential matter, ask them not to talk about it to others, ask them to be forthright and honest with me in the investigation, and ask them what I need to know." She said she obtains copies of any documentation that would support or disprove an allegation. When she has the information she needs to evaluate the complaint, she reviews it with the appropriate ethics supervisor.

Ms. Beiler said it is her impression that some ethics supervisors might not be fully "in touch with" ethics issues other than doing the reporting, "unless they trip over something or something is brought to them." "They're not as into the day-to-day things as one might think." Ms. Beiler said in her experience, the DES's who are familiar with Human Resources principles are the best equipped to handle DES duties. She said Deputy Commissioner Karen Rehfield, of the Department of Education and Early Development, and Administrative Services Director Tom Lawson, of the Department of Fish and Game, have consulted with her about potential ethics violations. "In some cases, they decide to do it on their own, and in some cases they leave it with us." She said when she worked as Human Resources director for DEED, Ms. Rehfield often "would have me do the investigation, we would confer, and then she'd report to the AG's office." In some cases, she said, Ms. Rehfield conducted the ethics investigation herself.

"I think it depends on your person, on your DES," she said. Ms. Beiler said alleged ethics violations tend to "lapse over into the HR world," and it makes sense for HR staff to investigate them the same way they investigate other types of problems. She said state employees often contact Management Services either directly or through their union to discuss ethics issues. "If part of the issue is an ethics violation," she said, "we certainly do address that immediately."

Ms. Beiler said the frequency of her interaction with the departments she works with—DEC, Fish and Game, and DNR—varies from department to department. She said she has worked with the DES in all three departments, but has worked most often with Tom Lawson of Fish and Game. "He understands HR, he's an admin[istrative] services director, and he and I interact on a regular basis." She said she does talk to the ethics supervisors for DEC and DNR, but "not as often." "They may actually deal with issues that I'm not aware of," she said. "I can't speak to that because I don't have as much direct interaction with them."

Jackson Steele, Workforce Development Manager, Division of Personnel

The ombudsman investigator interviewed Human Resource Specialist V Jackson Steele. Mr. Steele is Workforce Development Manager in the Training and Development section (T&D) of the Division of Personnel, where he has worked for approximately five years after a career in the private sector telecommunications industry. The T&D Web site says this section "provides professional supervisory, management, leadership, EEO compliance, and interpersonal skills training development and delivery. Courses are offered on an open-enrollment (scheduled), special session (request), and customized basis. T&D staff is also available for training and performance development consultation." The T&D Web site describes the supervisor academy:

Academy For Supervisors – AFSU

This five-day course is designed for newly-appointed supervisors and more experienced supervisors when their knowledge and skill development needs can be met by AFSU course learning objectives. Supervisors will learn the basic knowledge and skills necessary for the lawful, ethical, and effective supervision of State of Alaska employees.

Mr. Steele said the EBEA is not specifically included in the curriculum of this week-long supervisory training program. He said the program materials emphasize "the responsible role of a supervisor in terms of their being agents of the organization." He said the message is, "what you say and do" sets an example for subordinates in an agency. "They don't read the Ethics Act, or anything like that," he said. Mr. Steele said the purpose of the program is to give enough

information to the supervisors for them to counsel their employees, especially during new employee orientation, and to deal with employee questions and concerns as they arise.

Mr. Steele said his development team is always evaluating the components of the curriculum, and he would be happy to consider adding an ethics component to the training program. He said a handout could be developed containing key points about ethics issues.

Mr. Steele said in his prior experience in the private sector telecommunications industry, “we covered ethics annually in great detail about what you can and can’t do.” In his time working in state government, he said, he has been “a little surprised” that there is not more ethics training.

SURVEY OF DESIGNATED ETHICS SUPERVISORS

The Office of the Ombudsman obtained a list of Designated Ethics Supervisors (DES’s) for the Executive Branch of Alaska state government from the Ethics Attorney in the Department of Law and selected a large number of them to participate in a survey. The survey, conducted in December 2006 and January 2007, included the state agencies shown in the table on page 19.

Each participant was asked the same 22 questions. The answers to these questions provided an overview of how the DES’s think the EBEA works in practice at the department or agency level. The last survey question solicited comments and/or suggestions for improvement of the DES mechanism. Those suggestions are summarized after the relevant responses detailed below.

Position of DES in agency

1. Who is the department’s Designated Ethics Supervisor?

(The DES or acting DES was asked the following questions, as appropriate.)

2. Did the commissioner or agency head formally delegate this responsibility to you?

AS 39.52.960(8) defines “designated supervisor”:

- (8) "designated supervisor" or "supervisor" means
 - (A) the commissioner of each department in the executive branch, for public employees within the department;
 - (B) the president of the University of Alaska, for university employees;
 - (C) the attorney general, for the governor and lieutenant governor;
 - (D) the executive director of a board or commission for the staff of the board or commission;
 - (E) the chair or acting chair of the board or commission, for the members and the executive director of a board or commission; and
 - (F) the governor, for commissioners and for other public officers not included in (A) - (E) of this paragraph; or
 - (G) a public officer designated by a commissioner, the university president, or the governor to act as the supervisor if the name and position of the officer designated has been reported to the attorney general; . . .

DES responsibilities are typically delegated by commissioners to a subordinate—usually a deputy or assistant commissioner or a division director—as permitted by paragraph (G) of this section. The ombudsman DES survey determined that those to whom this responsibility has been delegated are people with access to the information to do the job. A few large departments (Commerce, Labor, DOT/PF) divide the task among two or more agency managers. For boards and commissions, this responsibility is undertaken by the chair (for the members) and the executive director (for executive staff).

| <i>Department or Agency</i> | <i>Statutory DES</i> | <i>Delegated DES</i> |
|---|-----------------------------|-----------------------------|
| Administration | Commissioner | Deputy Commissioner |
| Commerce and Community Development | Commissioner | Deputy Commissioner |
| Division of Business, Corporations & Professional Licensing | | Director |
| Corrections | Commissioner | Director, Admin. Svcs. |
| Education and Early Development | Commissioner | Deputy Commissioner |
| Environmental Conservation | Commissioner | Director, Admin. Svcs. |
| Fish and Game | Commissioner | Director, Admin. Svcs. |
| Governor's Office | Governor | Director, Admin. Svcs. |
| Health and Social Services | Commissioner | Assistant Commissioner |
| Labor and Workforce Development | Commissioner | Assistant Commissioner |
| Workers Compensation Board | | Director |
| Law | Attorney General | Assistant Atty General |
| Military and Veterans Affairs | Commissioner | Special Assistant |
| Natural Resources | Commissioner | Project Assistant |
| Public Safety | Commissioner | Assistant Commissioner |
| Alcoholic Beverage Control Board | Chair | Director |
| Revenue | Commissioner | Director, Admin. Svcs. |
| Transportation and Public Facilities | Commissioner | Deputy Commissioner |
| Highways and Public Facilities | | Deputy Commissioner |
| Aviation | | Deputy Commissioner |
| Central Region | | Regional Director |
| Northern Region | | Regional Director |
| Southeast Region | | Regional Director |
| Design and Engineering | | Chief Engineer |
| University of Alaska | President | Assoc. General Counsel |
| Big Game Commercial Services Board | Chair | Licensing Examiner |
| Commercial Fisheries Entry Commission | Chair | Hearing Officer |
| Board of Game | Chair | Executive Director |
| Board of Fisheries | Chair | Executive Director |
| Alaska Housing Finance Corporation | Executive Director | Executive Director |
| Alaska Industrial Development & Export Authority | Chair | Executive Director |
| Knik Arm Bridge and Toll Authority | Chair | Executive Director |
| Local Boundary Commission | Chair | Chair |
| Oil & Gas Commission | Chair | Chair |
| Alaska Permanent Fund Corporation | Chair | Dir. of Communications |
| Personnel Board | Chair | Deputy Commissioner |
| Pioneers' Homes Advisory Board | Chair | Assistant Commissioner |
| Alaska Railroad Corporation | CEO | CEO |
| Regulatory Commission of Alaska | Chair | Chair |
| Alaska Seafood Marketing Institute | Chair | Executive Director |

Suggestions: Some people suggested that the DES should never be the commissioner, but a subordinate with fewer responsibilities. AS 39.52.960(8)(G) expressly provides for such delegation of the DES role, and no department commissioner actually performed that role at the time of this survey. However, the CEO for the Alaska Railroad Corporation, who performs this function himself, contended that it's important for the agency head to know what ethics issues are coming up in their organization.

Training

3. What training did you receive from the state to perform this function?
4. Have you received any other training from non-state trainers? Did you find the training source or did your department find the source?

The most common training the surveyed DES's received was through viewing the State Ethics Video, "The Ethics Law: A Guide to Ethical Behavior In State Government," a 25-minute presentation developed by the Department of Law in the mid 1990s and revised in 2004. Law distributes the video to various departments and has posted it on Law's Internet Web site, supplemented by Law's brochure and the EBEA statutes, also posted on the Web site. A few DES's said they had attended a training session presented by the Department of Law; most said they had received no training at all beyond viewing or reading the ethics materials. Some DES's had extensive experience with the law (several are attorneys) and several had experience screening ethics disclosure forms about outside employment of state employees. Such routine ethics disclosure statements appear to constitute the bulk of work done by DES's in executive branch departments.

Suggestions: Several DES's suggested that there should be more ethics training; some suggested training and reminders for agency staff should occur more frequently.

Written guidelines

5. Do you have a procedures manual or a set of guidelines in addition to the Executive Branch Ethics Act (AS 39.52) and associated regulations (9 AAC 52)?

No DES could identify guidelines for performing their duties apart from a brochure and short statement of duties posted on the Department of Law Web site. On a related point, the term "ethics" meant different things for different people. For example, Corrections has a Code of Ethical Professional Conduct (P&P 202.01) that all employees must subscribe to. The Alaska State Troopers give special ethics training to their staff emphasizing the theme of "bell, book, and candle." (Does a situation set off a warning bell in your head? Do your actions comply with Standard Operating Procedures? How would you feel if someone shined a light on your action or decision?)

DES's for DOT/PF, the Commercial Fisheries Entry Commission, AHFC, the Alaska Industrial Export and Development Authority, and the Workers Compensation Board said they have agency policy on ethics, but few could produce it when asked to do so. Most agencies appear to rely on the EBEA and the "Code of Ethics" set out in regulation at 9 AAC 52. The Department of Fish and Game has a seven-page SOP section (II-040) on "Ethics/Standards of Professional Conduct" that could serve as a model for other departments. Several DES's said information about the Ethics Act, usually Law's brochure, "Ethics Information for Public Employees," is contained in "new hire" personnel packets.

Suggestions: One DES said it would be helpful to have a checklist to follow and rely on, with ethics guidelines.

Record keeping

6. Do you keep files on ethics matters? What do you keep in these files? Do you keep any of the following types of records in your ethics files?
 - a. written complaints
 - b. notes on complaints
 - c. phone log
 - d. notes on phone conversations regarding complaints
 - e. e-mail communications
 - f. letters
 - g. ethics disclosure forms
 - h. notes on requests from department employees for advice
 - i. written determinations
 - j. quarterly reports to the Office of the Attorney General
 - k. notes on discussions of complaints or questions with the Ethics Attorney at the Office of the Attorney General
 - l. anything else? (please specify)

It was clear from the answers to this question as well as to questions 18-21 (see below) that by far the most common EBEA matter that DES's look at is ethics disclosure statements. "Determinations" by DES's tended to be limited to screening these forms for potential conflicts between state employment and a second job. Many DES's had never conducted an investigation or received an ethics complaint and had no records of that sort of activity. Several said they send a quarterly report to the Ethics Attorney at the Department of Law.

Access to the Ethics Attorney

7. How often do you consult with the Ethics Attorney at the Office of the Attorney General?
8. How accessible have you found the AG's Ethics Attorney to be?

All respondents said they have had excellent access to the Ethics Attorneys in the Attorney General's office and have found them very responsive. A few corporation heads (AHFC, Alaska Railroad Corporation, University of Alaska) noted that they have their own legal staff to consult with on ethics matters.

Ethics updates

9. Do you receive periodic ethics updates from the Attorney General's Office?

Several DES's recalled getting updates on ethics matters from the Department of Law, but such updates appear to have been infrequent. The Ethics Attorney position (which was part-time until May 2006) circulated throughout the Attorney General's office for several years. In recent years the position has been held by Neil Slotnick, Lisa Kirsch, Paul Lyle, and David Jones, among others. In May 2006 Judy Bockmon was hired specifically for this position full-time. Ms. Bockmon told the ombudsman investigator she does not actually devote all of her time to ethics matters. She said the department planned to hire a half-time legal assistant to support the Ethics Attorney position.

Consultation with agency head (statutory DES)

10. How often do you consult with or advise the commissioner about ethics matters?

All DES's said they did this as needed, mainly for non-routine problems.

Documentation of DES activities

11. Do you keep track of the number of ethics matters brought to your attention on a quarterly or yearly basis?

All respondents said they documented their activities "quarterly" except one DOT/PF DES who said he does it yearly. The Ethics Act requires DES's to report quarterly. The Department of Law sends out reminders and follows up.

Ethics training inside agency

12. Do you periodically conduct training on the EBEA with department directors, supervisors, or staff? (If not,) who in the department does such training?

Respondents gave a variety of answers to this question. A common response was that the DES sends out annual reminders to employees to submit the ethics disclosure statement for outside employment. Some DES's said they talked at directors' retreats, a few said they got training from the Department of Law, several said personnel staff trained new hires in the EBEA, a few said Division of Personnel staff offered refresher courses. Many of the DES's had never done training themselves. One DES said he circulated the state ethics training video among agency staff. Ms. Bockmon said she envisions doing more training than the part-time Ethics Attorneys have been able to do in the past.

Ethics reminders

13. Does the ethics supervisor issue periodic reminders to department staff in general?

Most respondents said they do this annually, usually by e-mail, and usually it has to do with employees' annual reporting of outside employment. A few DES's said they send updates by e-mail or bring them up at meetings. Some agencies with high-profile ethics potential (e.g., Oil and Gas Conservation Commission, Knik Arm Bridge and Toll Authority) said they discuss it regularly at meetings. The Permanent Fund Dividend Corporation DES said new hires get trained, but no one gets a refresher. The Local Boundaries Commission DES said staff don't get reminders because "they already understand the law." A former DNR DES sent at least one ethics reminder e-mail to department staff in the past two years, as documented in the investigative report on Ombudsman Complaint A2006-0583.

Time and support devoted to DES tasks

14. What percentage of your work time is devoted to your duties as designated ethics supervisor? What other responsibilities do you have?
15. What timelines do you observe in handling queries and complaints under the EBEA?
16. Does your department allow you sufficient time to deal with ethics issues as they come up, in addition to your other work duties? How do you set priorities for these competing tasks?

All respondents said the DES duties take a very small part of their time, that their agency allows them plenty of time to do the job, and that they follow up on ethics matters right away—"ASAP" was a common answer. The longest any DES said it might take him to get to this is two weeks (DCED) for screening outside employment disclosure statements. For a few departments, screening such ethics disclosure statements appears to be a substantial task.

Written policy extending EBEA (AS 39.52.920)

17. Does your department have written policies extending the EBEA as permitted under AS 39.52.920?

Respondents almost unanimously answered “no” on this question, and a few who answered “yes” were probably mistaken. Any agency that did this would consult with the Attorney General's Office or their own agency counsel. Fish and Game's SOP on “Ethics/ Standards of Professional Conduct” states that it was “adopted pursuant to AS 39.52.920.”

Ethics inquiries in the past two years

18. How many questions have you received from department employees about the EBEA in the past two years?

Estimates varied with the size of the agency or department, ranging from “one” to “a few” to “half a dozen” to “two or three a month” to “less than a hundred” (DHSS) to “200” (DOT/PF Central Region) to “two dozen monthly” (Natural Gas Development Commission) to “I can't even count” (DOT/PF headquarters). Most ethics questions arise, apparently, when the annual outside employment disclosure renewal notice goes out. No DES had analyzed the range and frequency of different ethics matters that came to their attention.

Ethics disclosure statements in the past two years

19. How many disclosure forms have you received from department employees in the past two years?

“Tons” (Corrections), “hundreds” (Military and Veterans Affairs, Alaska Housing Finance Corporation), “thousands” (DHSS/Pioneers' Homes)—the latter “particularly with new hires” (many part-time employees work more than one job). Some agencies had none or just a few or “never had any” (Regulatory Commission of Alaska).

Ethics determinations in the past two years

20. How many determinations have you made in the past two years?

This question drew a blank for almost all respondents: they didn't recall doing any determinations, though a couple of people interpreted this as approving outside employment disclosure statements. The Alaska Railroad DES responded, “on average about once a week.” It appears that the definition of “determination” is not well understood by DES's. The Alaska Railroad Corporation DES said, correctly, “Every disclosure requires a determination.”

Ethics investigations in the past two years

21. How many investigations have you conducted into potential violations of the EBEA in the past two years?

This question drew another blank almost all around. This may be another area where DES's are unclear. The ombudsman conceived of this survey when a DES did what appeared to be dilatory and perfunctory investigations of two reported potential violations of the EBEA that the ombudsman referred, and was surprised that the ombudsman investigator had a different understanding of “investigation” than the DES did. The Alaska Railroad DES said, “There have been a couple [of ethics investigations], and they have revolved around gift giving.” The DCED DES said they had done four investigations. The Department of Education and Early Development (DEED) said, “Less than 10, not really an investigation, but rather something that

is looked into to see if it is a violation or something that could be a violation.” These sound like determinations or preliminary reviews rather than investigations.

The Commercial Fisheries Entry Commission DES did two formal investigations. The Labor and Workforce Development DES said, “‘Investigations’ is an odd term. ‘Significant reviews’ is what we call them, and there have been two.” “Significant review” is not a term in the EBEA, but the language recalls sections 110(b) (“insignificant”) and 230 (“shall review the report to determine whether a violation may exist”). The Military and Veterans Affairs DES said there had been one investigation. The Oil and Gas Conservation Commission DES said he had “participated in one involving a prior commissioner.” The AHFC DES said “two or three” investigations. The DOT/PF Central Region DES said “three or four.” The DOT/PF Southeast Region DES said “a couple.” Presumably, all of these investigations were reported to the Ethics Attorney. If not, then DES’s may be unclear on the reporting requirements of the EBEA.

DES comments and suggestions

22. Do you have suggestions or recommendations that would help new ethics supervisors perform this duty?

- Alaska Railroad Corporation: “The senior person does need to be involved in the ethics decisions. Even if they don’t make them, they need to see what is going on, and they need to be a part of everything.”
- Administration: “The commissioner level for the DES should be lower; deputy commissioner or director would be a more appropriate level. But every agency is different.”
- DCED: “There’s a new tape of ethics training that staff need to watch yearly. The handbook with the Department of Law logo on it is useful. Many common questions posed by staff are things that are dealt with internally, with computer use as an example.”
- Industrial Development and Export Board: “There should be a semi-annual refresher course for state departments. Remind people what’s going on. Now the only thing that is done is upon hiring.”
- Corrections: “See that the ethics disclosure form is improved, work on a time frame to get the job done, and work together.”
- DEED: “Communication with your division and program will be better in the long run if you issue reminders and make more people aware of the Ethics Law.”
- DEC: “Some ethics supervisors feel they are more qualified to make EBEA determinations than directors.”
- Alaska Seafood Marketing Institute: “Make sure ethics training is set up on a routine basis, especially for people who haven’t ever worked in the government. Easier-to-understand ethics materials would help, also.”
- Labor and Workforce Development: “It would be nice to get more training.”
- Workers Compensation Board: “I’d like a checklist for people to follow and rely on, with ethics guidelines, or a checklist. I like the AG brochure on EBEA.”
- DMVA: “More training would be nice.”
- Oil and Gas Conservation Commission: “Availability of more training would be good.”

- DOT engineer: "More training."
- DOT Central: "More training by Law would be good due to the turnover rate in the agency."
- Knik Arm Bridge and Toll Authority: "You have to look at the context of the agency where you work. Ethics concerns vary [from agency to agency]."

SUMMARY OF SURVEY RESULTS

Responses to the ombudsman's survey of Designated Ethics Supervisors suggest there is a need for more training, more often for executive branch DES's as well as for employees in general. There also appears to be a need for clarification of the role of DES. In particular, what constitutes a "report of a potential violation" or a "complaint," and what warrants a "determination" or an "investigation" by the DES seem imperfectly understood. It also seems unclear to some DES's which if any of these should be reported to the Ethics Attorney. The short handout titled "Responsibilities of Agency Designated Ethics Supervisors" on Law's Internet Web site (see Appendix A) addresses these points with just one sentence: "As designated ethics supervisor, you must . . . 2. Review all disclosures, investigate potential ethics violations, make determinations regarding conduct, and take action."

STANDARDS

Chapter 39.52. ALASKA EXECUTIVE BRANCH ETHICS ACT [excerpts]

AS 39.52.010. Declaration of policy.

- (a) It is declared that
 - (1) high moral and ethical standards among public officers in the executive branch are essential to assure the trust, respect, and confidence of the people of this state;
 - (2) a code of ethics for the guidance of public officers will
 - (A) discourage those officers from acting upon personal or financial interests in the performance of their public responsibilities;
 - (B) improve standards of public service; and
 - (C) promote and strengthen the faith and confidence of the people of this state in their public officers;
 - (3) holding public office or employment is a public trust and that as one safeguard of that trust, the people require public officers to adhere to a code of ethics;
 - (4) a fair and open government requires that executive branch public officers conduct the public's business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest; . . .

AS 39.52.110. Scope of code.

- (a) The legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust. In addition, the legislature finds that, so long as it does not interfere with the full and faithful discharge of an officer's public duties and responsibilities, this chapter does not prevent an officer from following other independent pursuits. The legislature further recognizes that
 - (1) in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without personal and financial interests in the decisions and policies of government;
 - (2) people who serve as public officers retain their rights to interests of a personal or financial nature; and
 - (3) standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

(b) Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or

(2) action or influence would have insignificant or conjectural effect on the matter.

(c) The attorney general, designated supervisors, hearing officers, and the personnel board must be guided by this section when issuing opinions and reaching decisions.

AS 39.52.120. Misuse of official position.

(a) A public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person.

(b) A public officer may not

...

(3) use state time, property, equipment, or other facilities to benefit personal or financial interests;

(4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest;

(5) attempt to benefit a personal or financial interest through coercion of a subordinate or require another public officer to perform services for the private benefit of the public officer at any time; . . .

AS 39.52.150. Improper influence in state grants, contracts, leases, or loans.

(a) A public officer, or an immediate family member, may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a state grant, contract, lease, or loan if the public officer may take or withhold official action that affects the award, execution, or administration of the state grant, contract, lease, or loan. . . .

(d) A public officer shall report in writing to the designated supervisor a personal or financial interest held by the officer, or an immediate family member, in a state grant, contract, lease, or loan that is awarded, executed, or administered by the agency the officer serves.

AS 39.52.190. Aiding a violation prohibited.

It is a violation of this chapter for a public officer to knowingly aid another public officer in a violation of this chapter.

AS 39.52.210. Declaration of potential violations by public employees.

(a) A public employee who is involved in a matter that may result in a violation of AS 39.52.110 - 39.52.190 shall

(1) refrain from taking any official action relating to the matter until a determination is made under this section; and

(2) immediately disclose the matter in writing to the designated supervisor and the attorney general.

(b) A public employee's designated supervisor shall make a written determination whether an employee's involvement violates AS 39.52.110 - 39.52.190 and shall provide a copy of the written determination to the public employee and to the attorney general. If the supervisor determines that a violation could exist or will occur, the supervisor shall,

(1) reassign duties to cure the employee's potential violation, if feasible; or

(2) direct the divestiture or removal by the employee of the personal or financial interests that give rise to the potential violation. . . .

AS 39.52.230. Reporting of potential violations.

A person may report to a public officer's designated supervisor, under oath and in writing, a potential violation of AS 39.52.110 - 39.52.190 by the public officer. The supervisor shall provide a copy of the report to the officer who is the subject of the report and to the attorney general, and shall review the report to determine whether a violation may exist. . . .

AS 39.52.260. Designated supervisor's report and attorney general review.

(a) A designated supervisor shall quarterly submit a report to the attorney general which states the facts, circumstances, and disposition of any disclosure made under AS 39.52.210 - 39.52.240. . . .

AS 39.52.270. Disclosure statements.

(a) A public officer required to file a disclosure statement under this chapter shall meet the requirements of this subsection in making the disclosure. . . .

(b) A designated supervisor who receives a disclosure statement under AS 39.52.110 - 39.52.220 shall review it. If the designated supervisor believes that there is a possibility that the activity or situation reported in a disclosure statement filed under AS 39.52.110 - 39.52.190 may result in a violation of this chapter, the designated supervisor shall take appropriate steps under AS 39.52.210 - 39.52.240. Failure of the designated supervisor to proceed under AS 39.52.210 - 39.52.240 does not relieve the public officer of the public officer's obligations under those statutes.

(c) In this section, "disclosure statement" means a report or written notice filed under AS 39.52.110 - 39.52.220.

AS 39.52.310. Complaints.

(a) The attorney general may initiate a complaint, or elect to treat as a complaint, any matter disclosed under AS 39.52.210, 39.52.220, 39.52.250, or 39.52.260. . . .

(b) A person may file a complaint with the attorney general regarding the conduct of a current or former public officer. A complaint must be in writing, be signed under oath, and contain a clear statement of the details of the alleged violation. . . .

(d) The attorney general shall review each complaint filed, to determine whether it is properly completed and contains allegations which, if true, would constitute conduct in violation of this chapter. The attorney general may require the complainant to provide additional information before accepting the complaint. If the attorney general determines that the allegations in the complaint do not warrant an investigation, the attorney general shall dismiss the complaint with notice to the complainant and the subject of the complaint.

(e) The attorney general may refer a complaint to the subject's designated supervisor for resolution under AS 39.52.210 or 39.52.220.

(f) If the attorney general accepts a complaint for investigation, the attorney general shall serve a copy of the complaint upon the subject of the complaint, for a response. . . .

(h) A violation of this chapter may be investigated within two years after discovery of the alleged violation. . . .

AS 39.52.410. Violations; penalties for misconduct.

(a) If the personnel board determines that a public employee has violated this chapter, it
(1) shall order the employee to stop engaging in any official action related to the violation;

(2) may order divestiture, establishment of a blind trust, restitution, or forfeiture; and

(3) may recommend that the employee's agency take disciplinary action, including dismissal. . . .

AS 39.52.960. Definitions.

In this chapter, unless the context requires otherwise,

. . .

(3) "benefit" means anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value; . . .

(5) "business" includes a corporation, company, firm, partnership, sole proprietorship, trust or foundation, or any other individual or entity carrying on a business, whether operated for profit or non-profit; . . .

(7) "compensation" means any money, thing of value, or economic benefit conferred on or received by a person in return for services rendered or to be rendered by the person for another;

(8) "designated supervisor" or "supervisor" means

(A) the commissioner of each department in the executive branch, for public employees within the department;

(B) the president of the University of Alaska, for university employees;

(C) the attorney general, for the governor and lieutenant governor;

(D) the executive director of a board or commission for the staff of the board or commission;

(E) the chair or acting chair of the board or commission, for the members and the executive director of a board or commission; and

(F) the governor, for commissioners and for other public officers not included in (A) - (E) of this paragraph; or

(G) a public officer designated by a commissioner, the university president, or the governor to act as the supervisor if the name and position of the officer designated has been reported to the attorney general;

(9) "financial interest" means

(A) an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit;

(B) holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management;

(10) "gain" includes actual or anticipated gain, benefit, profit, or compensation;

(11) "immediate family member" means

(A) the spouse of the person;

(B) another person cohabiting with the person in a conjugal relationship that is not a legal marriage; . . .

(C) a parent, sibling, grandparent, aunt, or uncle of the person; and

(D) a parent or sibling of the person's spouse; . . .

(14) "official action" means a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer; . . .

(18) "personal interest" means an interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership, in any organization, whether fraternal, nonprofit, for profit, charitable, or political, from which, or as a result of which, a person or organization receives a benefit; . . .

(20) "public employee" or "employee" means a permanent, probationary, seasonal, temporary, provisional, or nonpermanent employee of an agency, whether in the classified, partially exempt, or exempt service;

(21) "public officer" or "officer" means

(A) a public employee;

(B) a member of a board or commission; and

(C) a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties; in this paragraph, "trust" has the meaning given in AS 37.14.450;

(22) "source of income" means an entity for which service is performed for compensation or which is otherwise the origin of payment; if the person whose income is being reported is employed by another, the employer is the source of income; if the person is self-employed by

means of a sole proprietorship, partnership, professional corporation, or a corporation in which the person, the person's spouse or child, or a combination of them, holds a controlling interest, the "source" is the client or customer of the proprietorship, partnership, or corporation; if the entity which is the origin of payment is not the same as the client or customer for whom the service is performed, both are considered the source.

9 AAC 52 Executive Branch Code of Ethics [excerpts]

9 AAC 52.010. Appearance of impropriety

An appearance of impropriety does not establish that an ethical violation exists.

9 AAC 52.040. Unwarranted benefits or treatment

- (a) As used in AS 39.52.120(a), "unwarranted benefits or treatment" includes
- (1) a deviation from normal procedures for the award of a benefit, regardless of whether the procedures were established formally or informally, if the deviation is based on the improper motivation; . . .
 - (b) A public officer may not grant or secure an unwarranted benefit or treatment, regardless of whether the result is in the best interest of the state. . . .

9 AAC 52.050. Use of state time, property, equipment, or other facilities

A public officer who uses state time, property, equipment, or other facilities to benefit the officer's personal or financial interest is not in violation of AS 39.52.120(b)(3) if the officer's designated supervisor determines that the use is insignificant, the attorney general has not issued a general opinion against the use, and the attorney general does not advise the officer against the use.

9 AAC 52.090. Outside employment or service

For purposes of AS 39.52.170, a public employee's outside employment or service, including volunteer service, is incompatible or in conflict with the proper discharge of official duties if the employee's designated supervisor reasonably determines that the outside employment or service

- (1) takes time away from the employee's official duties;
- (2) limits the scope of the employee's official duties; or
- (3) is otherwise incompatible or in conflict with the proper discharge of the employee's official duties.

9 AAC 52.110. Ethics files

- (a) A designated supervisor shall maintain an ethics file containing Ethics Act reports, advisory opinions, advisory opinion requests, complaints, disclosures, and determinations relevant to that supervisor's agency or administrative unit.
- (b) A designated supervisor shall segregate confidential material from other ethics file material that is available for public inspection.
- (c) An executive director of a board or commission may maintain the ethics file of the chair of the board or commission. The ethics file of the chair of a board or commission may be combined with the ethics file of the designated supervisor of the staff of the board or commission.

9 AAC 52.130. Designated supervisor's report

- (a) A designated supervisor shall submit the quarterly report described in AS 39.52.260 during the 45 days following the end of each calendar quarter. . . .

9 AAC 52.140. Complaints

- (a) The attorney general will, in the attorney general's discretion, conduct a preliminary ethics investigation before initiating or accepting a complaint. A preliminary ethics investigation and information discovered in the course of a preliminary ethics

investigation is confidential to the same extent as information discovered in an ethics investigation conducted after the acceptance of a complaint.

(b) The attorney general will, in the attorney general's discretion, refer a complaint to the subject's designated supervisor under AS 39.52.310(e) and, at the same time, accept the complaint for an ethics investigation under AS 39.52.310(f) and (g).

(c) If the attorney general refers a complaint under AS 39.52.310(e) and the designated supervisor determines that a violation of the Ethics Act or this chapter has occurred, the designated supervisor shall forward those findings to the attorney general for review under AS 39.52.310 - AS 39.52.350. . . .

9 AAC 52.180. Attorney general review of agency policies

The attorney general will approve a written policy described in AS 39.52.920 if it is consistent with and furthers the purposes of the Ethics Act and this chapter. As a condition of approval, the attorney general will require that the policy be distributed to employees of the agency and to new employees of the agency upon employment, and require that the policy be centrally posted in the agency's offices.

9 AAC 52.990. Definitions

(b) In the Ethics Act and in this chapter

(2) "Ethics Act" means Alaska Executive Branch Ethics Act (AS 39.52);

(4) "improper motivation" means a motivation not related to the best interests of the state, and includes giving primary consideration to a person's

- (A) kinship or relationship with a public officer;
- (B) financial association with a public officer;
- (C) potential for conferring a future benefit on a public officer; or
- (D) political affiliation;

(6) "personal gain" means a benefit to a person's or immediate family member's personal interest or financial interest;

(9) "subject" means an individual who either

- (A) is being investigated for a potential violation of the Ethics Act or this chapter;
- or
- (B) is the individual against whom a complaint is filed under the Ethics Act or this chapter.

11 AAC 67.005. General qualifications

(c) An employee of the department is not eligible to acquire land by negotiated sale or negotiated lease. An employee or contractor of a state agency or other instrumentality of the state who gained knowledge of the disposal area at state expense, or who was in a position to obtain inside information about the disposal process, may not

(1) within the final 15 days of the filing period,

- (A) apply for a disposal of land under AS 38.05.057 or AS 38.08; or
- (B) file a sealed bid for an auction to be held under AS 38.05.055; or

(2) acquire land within the first 30 days that it is offered over the counter under AS 38.05.057(f) or AS 38.05.060.

Department of Natural Resources. Procurement Policies and Procedures

1.8.1. Contracting with State Employees. To avoid the appearance of any conflict of interest, DNR employees and immediate members of DNR employees' families may not sell or contract with DNR for supplies or services. This policy is not intended to limit employees from contracting or doing business with other State agencies provided that business or outside employment is not incompatible with, in actual conflict with, or appears to be in conflict with the proper discharge of the employees' duties (2 AAC 07.940) and that the appropriate paperwork is on file with the Department Ethic's [sic] Officer. Requests for waivers of this policy may [be] submitted by the employee through the Director, Support Services Division, to the Commissioner for a decision. [Ombudsman Note: DNR rescinded this policy effective August 28, 2007.]

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Office of the Ombudsman investigations and misconduct statutes and regulations

AS 24.55.100. Jurisdiction.

- (a) The ombudsman has jurisdiction to investigate the administrative acts of agencies.
- (b) The ombudsman may exercise the ombudsman's powers without regard to the finality of an administrative act.

AS 24.55.110. Investigation of complaints.

The ombudsman shall investigate any complaint that is an appropriate subject for investigation under AS 24.55.150, unless the ombudsman reasonably believes that

- (1) there is presently available an adequate remedy for the grievance stated in the complaint;
- (2) the complaint relates to a matter that is outside the jurisdiction of the ombudsman;
- (3) the complaint relates to an administrative act of which the complainant has had knowledge for an unreasonable length of time before the complaint was submitted;
- (4) the complainant does not have a sufficient personal interest in the subject matter of the complaint;
- (5) the complaint is trivial or made in bad faith;
- (6) the resources of the ombudsman's office are insufficient for adequate investigation.

AS 24.55.160. Investigation procedures.

- (a) In an investigation, the ombudsman may
 - (1) make inquiries and obtain information considered necessary;
 - (2) enter without notice to inspect the premises of an agency, but only when agency personnel are present;
 - (3) hold private hearings; and
 - (4) notwithstanding other provisions of law, have access at all times to records of every state agency, including confidential records, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants.
- (b) The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. However, the ombudsman may not disclose a confidential record obtained from an agency.

AS 24.55.220. Misconduct by agency personnel.

If the ombudsman believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of the officer's or employee's official duties, the ombudsman shall refer the matter to the chief executive officer of the agency or, when appropriate, to a grand jury or to another appropriate official or agency.

21 AAC 20.020. Complaints

(a) Except as provided in (b) of this section, a complaint to the ombudsman need not be in writing.

(b) A complaint that alleges a breach of duty, misconduct, or discourtesy by an officer or employee of an agency may not be investigated unless the complaint is specific and in writing. If a complainant requires assistance in writing the complaint, the ombudsman or a member of the ombudsman's office staff will provide the assistance.

ANALYSIS AND PROPOSED FINDINGS

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. "The ombudsman may investigate to find an appropriate remedy."

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is justified, partially justified, not supported, or indeterminate. A complaint is justified "if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid." Conversely, a complaint is not supported if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is justified and that the complainant's action or inaction materially affected the agency's action, the complaint may be found partially justified. A complaint is indeterminate if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The standard used to evaluate all ombudsman complaints is a preponderance of the evidence. If a preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation should be found justified.

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Allegation 1: The Designated Ethics Supervisor for DNR performed inefficiently in investigating potential violations of the Executive Branch Ethics Act.

The relevant portions of the Ombudsman Policies and Procedures Manual at 4040(14) discuss the statutory phrase "performed inefficiently":

"Performed inefficiently" generally covers instances of unreasonable agency delay and ineffectual performance.

(A) The timeliness of an administrative act is sometimes an issue. An agency performed inefficiently when an administrative act exceeded:

(a) a limit established by law (statute, regulation, or similar enacted source) or

(b) a limit or a balance established by custom, good judgment, sound administrative practice, or decent regard for the rights or interests of the person complaining or of the general public.

On June 20, 2006, the ombudsman investigator mailed to Mr. Saddler the report of a potential violation of the EBEA referenced under ombudsman complaints A2006-0546 and J2006-0165. After repeated inquiries about the status of his review from the ombudsman investigator, Mr. Saddler reported his conclusions on August 2, 2006. Mr. Saddler based his determination on the information provided by the ombudsman investigator and one telephone call. Six weeks seems an excessive amount of time to make a simple determination.

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On July 31, 2006, the ombudsman investigator faxed to Mr. Saddler the report of a potential violation of the EBEA referenced under ombudsman complaint A2006-0583. After repeated inquiries about the status of his review from the ombudsman investigator, Mr. Saddler reported on October 30, 2006, his determination that the complaint had no merit because Mr. Sullivan had terminated state service prior to the date the fork-lift rental occurred. Asked to document this determination, Mr. Saddler reported on November 2 that his October 30 determination had been mistaken and that the rental constituted “a technical violation” of the EBEA.

Because Mr. Saddler did not document his efforts, it is difficult to reconstruct why it took from July 31 to November 2 to evaluate this report of a potential violation of the EBEA. However, it seems plain both from the relatively simple set of facts the DES received, as well as from his repeated apologies for the delay in reporting his determination, that it took far too long for him to evaluate the evidence and make a decision. There are no set guidelines for responding to a report of this type. Some matters will inevitably take longer than others to evaluate, and a DES’s other job demands may well delay for short periods action on a complaint or report of a potential violation of the EBEA. However, the purpose of the ethics laws does not appear to be well served by delaying a decision for weeks and months that could easily be resolved within a week or two at most.

DES’s surveyed by the ombudsman all said they assign a high priority to resolving ethics issues and that their agency allows them sufficient time to do so. Mr. Saddler’s delayed evaluation of the two reports of potential violations of the EBEA forwarded by the ombudsman suggests that DNR does not place the same priority on resolving such issues promptly that other State of Alaska agencies do.

Finding on Allegation 1

Under ombudsman standards, an administrative act was *performed inefficiently* if the agency “exceeded a limit or a balance established by custom, good judgment, sound administrative practice, or decent regard for the rights or interests of the person complaining or of the general public.”

Mr. Saddler knew both the ombudsman investigator and the persons who contacted the ombudsman were waiting for him to evaluate the reports of potential violations of the EBEA, yet he took six weeks in one case and 13 weeks in the other to conclude his review. In each case, moreover, he based his conclusions on undocumented communications with department staff, using only the records provided by the ombudsman investigator. Apart from a few undocumented phone calls, he obtained no further information beyond what he received at the outset from the ombudsman. The obvious question is why it took the DES so long to evaluate relatively simple sets of facts on the basis of information he received within a day or two after learning of them. Mr. Saddler’s candid response—“there’s no excuse”—is the correct one.

The ombudsman proposes to find Allegation 1 **justified**.

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Allegation 2: The Designated Ethics Supervisor's determination regarding an alleged violation of the Executive Branch Ethics Act was arbitrary.

The relevant portions of the Ombudsman Policies and Procedures Manual at 4040(5) define the statutory term "arbitrary":

(A) the agency's action or decision was not based upon an intelligible or understandable public policy decision; . . .

(D) the agency's action or decision was not based on a conscientious consideration of all relevant factors.

On June 20, 2006, the ombudsman investigator mailed to Mr. Saddler information relating to a report of a potential violation of the EBEA by Forestry employees (referenced above as ombudsman complaints A2006-0546 and J2006-0165). Mr. Saddler reported his determination on August 2, 2006. He appears to have based his determination primarily on the information provided by the ombudsman investigator and one telephone call to the supervisor of the Forestry employees.

Mr. Saddler concluded from comparing dates and timesheets that the two employees conducted personal business using state equipment during state office hours on days when they were officially at work. Based on their supervisor's assurance that the two employees "did not habitually use state time or resources for personal benefit, or violate office policy permitting de minimis use of state equipment for personal purposes," Mr. Saddler determined that "the phone call and fax transmission in support of the land purchase was not a significant use of state time or equipment." He said he would ask the supervisor to remind the two Forestry employees that "state law prohibits them from using state equipment or time for personal interests."

Mr. Saddler's determination and proposed remedy in this case most likely are measured and reasonable, but it should be noted that more careful inquiry into the matter might have disclosed whether, for instance, the employees faxed the land purchase application on their own "break" time (the "Tok Area Forestry" fax dateline shows the send time as 12:41), or whether, indeed, the supervisor encouraged or expressly permitted the employees to use the fax machine during state office hours. A DES should base a determination on "conscientious consideration of all relevant factors" in order to promote the public policy goals set forth in the EBEA.

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On July 31, 2006, the ombudsman investigator faxed to Mr. Saddler information relating to a report of a potential violation of the EBEA by DPOR employees (referenced above as ombudsman complaint J2006-0583). Mr. Saddler reported on October 30, 2006, his conclusion that the complaint had no merit because Mr. Sullivan had terminated state service prior to the date the fork-lift rental occurred. Asked to document this conclusion, Mr. Saddler reported on November 2, 2006, that his October 30 determination had been based on misinformation and that the rental in fact did constitute "a technical violation" of the EBEA.

Asked to document *this* conclusion, Mr. Saddler could produce no documentary evidence on which to base either of his determinations: no maintenance logs, no photos, no personnel records, no notes, no phone records, no e-mail messages—in short, no evidence beyond vaguely recollected telephone and e-mail communications with one of the subjects of the report of a potential violation of the EBEA. It was on the basis of such potentially self-interested hearsay

that Mr. Saddler issued his October 30 determination on this ethics inquiry. On what basis did the DES change his mind? Apparently, it was because the subject of the report changed her story, and not because the DES discovered new concrete evidence.

This occurred, moreover, in light of the fact uncovered by Mr. Saddler that his predecessor as DES had reminded all DNR employees just three weeks prior to the fork-lift rental that they must file ethics disclosure statements before entering into contracts for goods or services with department employees or their family. The fact that the DPOR supervisor violated that directive almost immediately would seem to call for careful analysis of the facts and documentation for the record to provide some sort of accountability. Mr. Saddler apparently saw no need for this, and at no time was the statutory DES for the department, the commissioner (at that time Mike Menge), informed of this apparent violation of the EBEA. Mr. Saddler said he informed Deputy Commissioner Ed Fogels about this ethics complaint. Mr. Fogels was not the statutory DES for the department and had not formally been delegated that role. Mr. Saddler said he did not know what Mr. Fogels did with this information.

Mr. Saddler's explanation of how and why he failed to document his actions as DES regarding this report of a potential violation of the EBEA is troubling in itself and also raises systemic issues. Mr. Saddler acted as if keeping records was somehow undesirable. Referring to notes on his communications with the subject of a reported potential ethics violation, he said, "You don't want to have a lot of notes following you." He discarded, altered, deleted, or destroyed phone notes and e-mail communications regarding the fork-lift rental, and he failed to obtain independent documentation of details relayed to him by a subject of the report—details that changed in significant ways over time. He took notes on his computer, then, apparently without mastering the information, edited out whatever seemed to him unimportant, with the result that he could not answer basic questions about the evidence or the facts of the matter. He could easily have kept a back-up file of his original notes for future reference, but said he chose not to do so.

Mr. Saddler kept no phone logs or e-mail records of his communications with the subject of a potential ethics violation. When the ombudsman investigator suggested he might be able to obtain some information from Ms. Plager, Mr. Saddler explicitly questioned whether a department supervisor whose integrity and performance were, according to Mr. Saddler, well-regarded by her colleagues could be trusted not to suppress information. He promised to attempt to obtain documentation he had discarded from other sources, but did not follow through. The question naturally arises, in light of all of the above, whether Mr. Saddler indeed ever kept *any* primary records of his actions as DES in the matter. The simplest explanation is that he did not.

Why does that matter? Mr. Saddler made one determination based on misinformation that could easily have been checked with a single phone call to the Division of Personnel. Then he changed that determination based on written questions about the facts of the case from the ombudsman investigator that Mr. Saddler never did manage to answer. It is difficult not to conclude that this matter was relatively unimportant to the DES and merited careless performance on his part.

In fairness it should be said that there appear to be no specific standards for record-keeping by a DES while evaluating evidence to arrive at a determination. Indeed, the survey of DES's conducted by the ombudsman elicited a wide range of characterizations of terms like "complaint," "determination," and "investigation." For his part, Mr. Saddler said he was "not sure what level of precision is required" in evaluating potential violations of the EBEA. This seems unreasonable given the manifest purpose of the EBEA to discourage unethical conduct and to provide mechanisms for bringing potentially unethical conduct to light and preventing or remedying it. Moreover, Mr. Saddler does not appear to have contacted the one person he knew had the expertise to clarify this and other questions relating to the evaluation of potential EBEA violations: the Assistant Attorney General for ethics.

In the absence of specific standards, it is possibly unfair to characterize Mr. Saddler's investigative methods as inadequate for the purposes of a DES. Yet the ombudsman believes this is an untenable situation. One index of the importance the Alaska Legislature intended to convey about the position of designated supervisor for ethics matters is that the position is statutorily assigned to the commissioners of the departments and to the top-level officer of other executive branch agencies. The EBEA clearly envisions that commissioners and some other heads will delegate this responsibility to staff who have the skills, access to information, and initiative necessary to carry out the duties of the position. However, the role of designated supervisor for ethics is a principal feature of the EBEA. The duties of the position should not be rendered ineffectual by inattention to detail or to the demands of common sense.

On both counts the performance of the DES for DNR detailed in this report appears ineffectual. The delay in both instances was unfortunate, but there was a more important principal at stake. Mr. Saddler professed to understand that \$250 expended for important work that was actually performed was not the point at issue. The ombudsman investigator suggested to Mr. Saddler that had the maintenance supervisor or the area superintendent telephoned Mr. Saddler to inquire whether the proposed rental would be appropriate under the circumstances, the DES could reasonably have concluded the potential violation of the EBEA was neither substantial nor significant, or he could have issued a waiver as DNR procurement P&P 1.8.1 expressly provided.⁴

The record, such as it is, appears to show that neither the area superintendent nor the maintenance supervisor contacted Mr. Saddler about the proposed rental of equipment from the maintenance supervisor's brothers. In addition, part of the original report of a potential violation of the EBEA was the allegation, not investigated by Mr. Saddler, that the two DNR supervisors openly discussed how to get around the obvious conflict of interest. Moreover, when asked about it, the area superintendent gave contradictory accounts of what happened, according to Mr. Saddler, and deflected his mention of Ms. Welch's ethics reminder to another topic. Common sense suggests that the DES should have documented his communications with Ms. Plager so that he could ensure accountability, justify his determination on this report, and satisfy the purpose of the EBEA (AS 39.52.010), to "promote and strengthen the faith and confidence of the people of this state in their public officers."

Moreover, Mr. Saddler said he did not think any mention of this complaint had been placed in Ms. Plager's personnel file. In the event that there should be any further ethics complaint or inquiry involving this DNR employee, on this topic or any other, there would be no record of this complaint, of Mr. Saddler's investigation and finding, or of how the matter was resolved.

Ms. Beiler of the Management Services section of the Division of Personnel commented that complaints about state employees frequently have an ethics component and that alleged ethics violations tend to "lapse over into the HR world." For this reason, she said, it makes sense for HR staff to investigate ethics complaints the same way they investigate other types of personnel problems. She said some DES's routinely confer with Management Services about ethics matters and sometimes ask management consultants to conduct an investigation. Had the DES for DNR conferred with Ms. Beiler on either of these matters, she could have investigated the potential violations of the EBEA in her customary manner, speaking to persons with information about the matter, obtaining documentation tending to support or disprove allegations of unethical conduct, and recommending appropriate remedies from an HR point of view to the DES.

⁴ On September 17, 2007, DNR Administrative Services Manager Leta Simons notified DNR procurement and supervisory staff by e-mail that "DNR's Procurement Policy 1.8.1., 'Contracting with State Employees', has been rescinded as of 8/28/2007. In the future, please refer to existing State procurement and ethics statutes, regulations and directives when procuring goods or services from State employees or their immediate family members."

Finally, Mr. Saddler said that although he found violations of the EBEA in both matters referred by the ombudsman, he did not report either of these findings to the Ethics Attorney. This seems to run counter to the spirit, if not the letter, of the reporting requirements for DES's set out in the EBEA.

Finding on Allegation 2

Under ombudsman standards, an administrative act was *arbitrary* if the agency's action or decision was not based on an intelligible or understandable public policy decision, or if the agency's action or decision was not based on a conscientious consideration of all relevant factors.

The determinations of the DES regarding the reported potential violation of the EBEA do not appear to have been based on careful consideration of all relevant factors. Indeed, it is difficult to understand what they were based on. Moreover, the DES could not articulate an intelligible rationale for his methodology in reviewing and evaluating the reports. As a result, the soundness of the DES determinations detailed in this report is open to question, and the stated public purpose of the EBEA does not appear to have been fulfilled.

The ombudsman proposes to find Allegation 2 ***justified***.

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The ombudsman proposes to find both allegations ***justified***. Therefore, the ombudsman proposes to find this complaint taken as a whole ***justified***.

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Ethics training for DES's, supervisors, and new employees

The Executive Branch Ethics Act designates supervisors for ethics at a very high level, thereby implying that it's an important function, but the formal complaint process provided for in the EBEA appears to set the bar so high that DES's do not in fact get many complaints. In the ombudsman's DES survey, hardly any of the DES's had received a formal complaint. Yet from ombudsman contacts and from information provided by the DES's and the Division of Personnel, it seems clear that ethics concerns are relatively common. When the ombudsman received two fairly low-level complaints about potential violations of the Ethics Act, it seemed that the obvious person to evaluate whether these were a problem or not, and then, if necessary, to take appropriate remedial action, was the DES for the department.

For a variety of reasons, this turned out to be the wrong choice. The DES survey responses suggest that the DES's are typically employed at such a high level in state government that they can't pay much attention to the day-to-day workings of the Ethics Act. For example, some agencies reported screening hundreds and even thousands of outside employment disclosure forms each year. The form has this note at the bottom, addressed to the DES:

Designated Ethics Supervisor: Provide a copy of the approval or disapproval to the employee. If the employment is disapproved or other action is necessary under AS 39.52.210 please attach a determination. A copy of the determination must be sent to the attorney general at the following address: State Ethics Attorney, Office of the Attorney General, Department of Law, 1031 West 4th Avenue, Suite 200 Anchorage, Alaska 99501-1994.

It is difficult to imagine a Commissioner-level DES personally going through so many forms, rather than delegating this task to clerical staff. Who trains those who screen the forms for

potential conflicts of interest and effectively makes determinations on them in accordance with the EBEA? Do the screeners actually read the forms and understand the potential conflicts or do they literally rubber-stamp the DES's signature on the form?

Many respondents to the ombudsman's survey of Designated Ethics Supervisors suggested there should be more practical ethics training for the supervisors and for state employees in general. In addition, while many of them said the principal method of training state employees in the requirements of the EBEA is to do this during new employee orientation, in fact this task has been delegated to the new employees themselves, and to hundreds (if not thousands) of supervisors among the more than 14,000 executive branch employees. Most of these supervisors are themselves not trained in the requirements of the EBEA. The supervisor academy is reported to provide all-around training for supervisors, but the curriculum currently does not contain a specific ethics component. The Division of Personnel should address this deficiency as soon as possible.

On a related point, the six-section "New Employee Orientation" in the Division of Personnel Web pages (<http://dop.state.ak.us/index.php?id=94>) contains a great deal of information important to a new employee. Among the many topics covered are several "time sensitive items that need to be completed," including 32 forms ranging from health insurance coverage selections to Supplemental Benefits System enrollment to union notification. There is information about (partial list):

- employment status
- probationary period
- performance evaluations
- timesheets
- payroll warrants and direct deposit
- salary schedules
- state holidays
- payroll deductions
- leave benefits
- union information
- retirement planning and deferred compensation.

In addition, the new employee must decide which of the following forms to fill out:

- employment eligibility verification form
- federal form W-4
- employee affidavit (oath of office)
- address authorization/change form
- confidentiality of information acknowledgement form

- direct deposit authorization form
- equal employment opportunity survey form
- union notification form
- prior service verification form
- Second Injury Fund questionnaire
- Drug Free Workplace Act acknowledgement form
- Social Security form SSA-1945
- designation of beneficiary for unpaid compensation form
- retirement beneficiary designation form
- SBS benefits beneficiary form
- beneficiary waiver form
- basic and optional life insurance enrollment or change form
- Health Insurance forms (including employee information form and Select Benefits Health Plan dependent enrollment form).

New employees must also read four administrative orders setting out state policy on EEO, Harassment, ADA, and Diversity—approximately 16 pages—and a six-page Personal Use of Office Technologies Policy. There is also a Statewide Policy Acknowledgement Form to fill out and sign.

A little less than halfway down this four-and-one-half page list in section 5 of the six-section on-line new employee orientation package, between the Union Notification form and the Prior Service Verification form, is the Ethics Disclosure form “(Required for Outside Employment)”:

Per AS 39.52.170 (b), the Executive Ethics Act [sic], employees are required to provide notice of employment or provision of services for compensation outside of the state's employment system. While volunteer work is not required to be disclosed under statute, employees who have any business or personal interest outside the state's employment system must also complete this form.

If this does not apply, you do not need to submit this form. [bold in original]

The new employee will have read pages and pages of new information, and will have read and filled out several forms by the time he or she arrives at the Ethics Disclosure form. The information provided on the orientation page (quoted above) gives very little explanation of the EBEA (which it misnames). A new employee who thought the form did not apply to him or her would simply skip this item. One who filled it out would think the EBEA applies principally to outside employment of a state employee.

In Section 6 of the orientation Web pages, item 15 of 22 (between “Division of Retirement and Benefits” and “Health Benefit Insurance Information”) is a link to “Ethics Information for Public Employees” with the following text underneath:

The Ethics Act (AS 39.52) applies to all current and former executive branch public employees and members of statutorily created boards and commissions.

Clicking on this link takes the new employee to the Department of Law “Executive Branch Ethics” page, which has links to the 25-minute state ethics video, seven forms, and a variety of links to documents, statutes, and the Alaska Administrative Code.

The Division of Personnel asks executive branch supervisors to allow new employees two hours to read the information listed above and fill out a wide variety of required and optional forms. It is easy to imagine that many, if not most, new employees will have difficulty absorbing so much new information, particularly when they will naturally feel pressured to fill out forms ensuring that they will be paid, that their beneficiaries are properly designated, and that their health care plan selections and dependent forms will be submitted without errors that may cause unnecessary delay. Few new employees are likely to finish these tasks, fill out multiple forms, and read the many pages of policy that come before the link on the last orientation page to the Department of Law Executive Branch Ethics page, and then browse through the Law Ethics Web page and locate its video and brochure. Ethics will inevitably appear to be just one more consideration among many, and certainly not one that requires immediate attention. Besides, there are seven more links to browse through after that.

When the new employee has finished filling out forms and reading information, the supervisor goes over a two-page, 32-item checklist (“New Employee Forms/Supervisor Checklist”) to be sure the new employee has correctly filled out the proper forms. The following instructions appear at the top of the checklist:

The following is a list of all of the forms that a new employee may be required to complete. It is the responsibility of the supervisor/administrative staff to review the forms and make sure all required forms are completed. The following list will aid you in knowing what needs to be reviewed for completeness on each form.

The ninth checklist item is “Ethics Disclosure Form—(if applicable).” “Complete form—Supervisor signature required and routed to the department ethics supervisor.” Given the number of required forms a supervisor has to account for and check for accuracy and completeness, one wonders how much time supervisors typically devote to explaining the requirements of the EBEA to new employees. Do they closely question new employees who may have mistakenly thought the form does not apply to them? Do they verify the information? It would be surprising if they did.

In short, the New Employee Orientation Web pages should be evaluated to see if information about the EBEA should perhaps be presented separately later, rather than as one more item to rush through in the process of filling out basic employment forms. Indeed, it might be better to wait 90 days to provide this information so that new employees have begun to master their new responsibilities and have gained some insight into their role in the overall hierarchy of executive branch agencies before exposing them to the requirements of the EBEA. Further, the role of supervisors in explaining the requirements of the EBEA to new employees needs reevaluation, and the supervisors clearly need some training in this area.

In addition, the ombudsman DES survey suggests that not much thought has been given to refresher training on the EBEA for employees who are not new—that is, for the vast majority of state employees. An employee who has worked for the state for five years, say, will have encountered the EBEA only at new employee orientation and once each year when the DES sends out a reminder that employees must submit a current ethics disclosure form for outside employment. Is it reasonable to expect that such an employee will have a good understanding of the requirements of the EBEA? The meager ethics training provided to state employees in

general seems inadequate if state government hopes to demonstrate to the public that it takes ethics seriously.

There also appears to be a need for clarification of the role of a DES. In particular, what constitutes a “report of a potential violation” or a “complaint,” and what warrants a “determination” or an “investigation” seem imperfectly understood by many DES’s. There appears to be some confusion, as well, about which, if any, of these should be reported to the Ethics Attorney in the Department of Law. In addition, DNR procurement policy 1.8.1 (recently rescinded; see Standards section above) provided that the commissioner, presumably acting as DES, could waive the requirements of the EBEA in certain unspecified instances so long as the intent of the EBEA was honored. The standards for making such a determination were not stated in the policy. Of the 40 executive branch agencies contacted by the ombudsman, just one—the Department of Fish and Game—has a comprehensive ethics policy adopted expressly as a supplement to the EBEA. Fish and Game’s policy could serve as a model for other State of Alaska executive departments.

The apparent confusion over basic terms and functions of the role of DES suggests that the state should take action to better train and equip its ethics supervisors and, indeed, its regular supervisors to handle the important task that has been delegated to them. It also seems appropriate for DES’s to confer with the Division of Personnel when evaluating inquiries and complaints relating to the EBEA. In the case of DNR as set out in this report, such consultation might have produced quicker and sounder results. In light of the probability that some DES’s are more familiar than others with the principles of Human Resources management and the services available to them from the Division of Personnel, a description of this valuable resource should be one component in the curriculum of any training program targeting DES’s.

PROPOSED RECOMMENDATIONS

Under AS 24.55.150(b) “The ombudsman may investigate to find an appropriate remedy.”

The ombudsman’s recommendations based on this investigation are set out below. Because DES’s consult with and report to the Ethics Attorney, Recommendations 5, 6, and 7 are addressed to the Department of Law. Because the Division of Personnel also plays a large part in dealing with ethics matters, Recommendations 7, 8 and 9 are addressed to Personnel. All recommendations are included for informational purposes.

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Recommendation 1: DNR should consult with the Department of Law to develop comprehensive Department policies and procedures for ethics for the DNR Ethics Supervisor and all staff.

The EBEA became law in 1986, yet the ombudsman survey of 2006-2007 revealed that very few agencies have policies that specify the ways in which the Ethics Act applies to how the agency does business with the public. Indeed, most state employees and many DES’s appear to have the impression that the EBEA is principally about potential conflicts arising from state employment and a second job. At the time the events detailed in this report occurred, DNR had a short Procurement Policy and Procedure (1.8.1) addressing ethics issues, but one of the cases detailed in this report suggests that some DNR supervisors did not understand the policy’s implications. DNR would do well to consult with the Department of Law in devising ethics policy and procedures that address potential conflicts of interest in the conduct of the agency’s routine business—for example, in such areas as land sales, contracts, and permitting. The ethics policies developed by the Department of Fish and Game could serve as a model.

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Recommendation 2: DNR, in conjunction with the Division of Personnel, should review the actions of the Division of Parks and Outdoor Recreation referred to in this report to determine whether the supervisor needs special training in the Ethics Act.

The DNR DES found that at least two supervisors participated in a violation of the EBEA, yet the DES appears to have taken no action to document these violations or to ensure that the supervisor who still works for the state understands the requirements of the law. This suggests that DNR's principal ethics officer had little interest in promoting adherence by department employees to standards set out in the Ethics Act. DNR should review how the DES handled this matter and take steps to ensure accountability and compliance with the law.

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Recommendation 3: DNR, in conjunction with the Division of Personnel, should separate training in ethics issues from the flood of first-day-on-the-job paperwork to emphasize the importance of this topic to new department employees.

DNR should take steps to ensure that new employees receive adequate information and training in those requirements of the EBEA that are likely to apply to them. By separating ethics training from first-day paperwork for new employees and providing additional training to supervisors, the department would send a clear message to employees that it places a high priority on ethical conduct.

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Recommendation 4: DNR should provide department employees periodic refresher training in provisions of the EBEA as they apply to department business.

All department employees would benefit from periodic refresher training in the requirements of the EBEA. A regular ethics newsletter issued at a different time from the yearly outside employment disclosure reminder would communicate to DNR employees the substance of the EBEA and the priority the State of Alaska and DNR assign to ethics in transacting the public's business. Because many violations of the EBEA are probably inadvertent, such a newsletter could illustrate its message constructively with typical scenarios department employees might encounter while working at DNR.

The Legislative Ethics Committee administrator publishes such a newsletter for a few hundred employees on a monthly basis. Much of the newsletter text takes the form of answering questions by Legislative Branch employees. Questions raised by DNR employees could be answered in a department newsletter issued a few times each year.

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Recommendation 5: The Department of Law should devise a model policy manual for administrative agencies to use when evaluating reports of potential violations of the EBEA that come to the attention of a designated ethics supervisor in an executive branch agency.

The short handout titled "Responsibilities of Agency Designated Ethics Supervisors" on the Department of Law Web site (see Appendix A) is too brief to be more than minimally helpful. The handout addresses the essential functions of a DES in just one sentence: "As designated ethics supervisor, you must . . . 2. Review all disclosures, investigate potential ethics violations, make determinations regarding conduct, and take action." These guidelines should be revised and expanded to include clear, detailed instructions on how to carry out the responsibilities of a designated ethics supervisor.

The Ethics Attorney should issue a uniform manual for DES's containing guidelines for the position's various functions illustrated with samples of completed forms, sample determinations, sample quarterly reports, and sample investigations. The manual need not be lengthy or complex, but it should contain a concise explanation of the types of evidence a DES should obtain on which to base a determination, and it should describe the types of documentation DES's should keep in their files. Complex or even moderately complex investigations should be referred to the Ethics Attorney, but reports of simple potential violations seem well within the capacity of a DES or the Division of Personnel to investigate and evaluate, provided the investigator understands the scope and methodology such an investigation entails.

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Recommendation 6: The Department of Law should design a training program for designated ethics supervisors that covers the EBEA and a variety of actual or potential violations of the Ethics Act that illustrate how a DES should process reports of potential violations.

How many hours of training are optimal should be left to the judgment of the Ethics Attorney in consultation with executive branch agencies. However, it would demonstrate commitment to carrying out the purposes of the EBEA to ask DES's to commit at least the equivalent of one working day to a training workshop and individual study of the EBEA, the State Ethics Video, and the guidelines, forms, and examples contained in the DES manual recommended above. It would further the purposes of the EBEA for DES's to meet and/or receive additional training and updates at least annually to keep up with turnover in the position and to provide continuing education and review of essential principles.

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Recommendation 7: The Department of Law should team with the Department of Personnel to develop a mechanism to provide regular ethics information and instructional updates for all state employees.

All department employees would benefit from periodic refresher training in the requirements of the EBEA. A regular ethics newsletter issued at a different time from the yearly outside employment disclosure reminder would communicate to state employees the substance of the EBEA and the priority the State of Alaska assigns to ethics in transacting the public's business.

The Legislative Ethics Committee administrator publishes such a newsletter for a few hundred employees on a monthly basis. Much of the newsletter text takes the form of answering questions by Legislative Branch employees. The Ombudsman ventures to guess that 14,000 state employees would give the author of such an executive branch newsletter much to write about.

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Recommendation 8: The Division of Personnel should augment the curriculum of the "supervisor academy" to include coverage of the requirements of the EBEA. In addition, the division should take steps to ensure that executive branch supervisory staff understands the resources available to address potential violations of the EBEA and to remove disincentives to reporting potential ethics violations to the Ethics Attorney or to the DES in executive branch agencies.

The incidents reviewed in this investigation and the responses to the ombudsman's DES survey strongly suggest the need to revisit how the EBEA has been implemented to ensure that disincentives to reporting potential ethics violations are removed or ameliorated by integrating Human Resources principles into the ethics complaint or reporting process for simple reports of

potential violations of the EBEA. The law as currently written requires that complainants file a sworn, written statement to the Ethics Attorney or the DES, and that a copy of that statement be provided to the subject of the reported potential violation. This requirement virtually guarantees that subordinates will not report potential violations by their superiors.

In some cases a sworn, written statement is necessary to provide due process protections to the accused and to discourage bad faith complaints. However, reports of relatively minor misconduct—for example, impermissible instances of “cutting corners”—will be rare so long as executive branch employees think all complainants and reporters are required to follow the formal process set out in the EBEA. This seems contrary to the intent of the law and, indeed, contrary to the understanding of some of those who carry out the duties it prescribes. The focus should be on bringing potential ethics violations to light and evaluating whether they require some sort of remedy, through waiver, education, admonition, or discipline.

As this progression of possible remedies suggests, potential violations of the EBEA range from minor and inadvertent infractions to some that may be substantial and willful. A DES should consult with Management Services on apparently minor infractions, and should contact the Ethics Attorney whenever a reported potential violation seems more serious or complex than the DES is trained to handle. The DES manual recommended above should address this point.

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Recommendation 9: The Division of Personnel should work with all state agencies to separate training in ethics issues from the flood of first-day-on-the-job paperwork to emphasize the importance of this topic to new department employees.

The Division of Personnel should take steps to ensure that all Departments afford new employees receive adequate information and training in those requirements of the EBEA that are likely to apply to them. By separating ethics training from first-day paperwork for new employees and providing additional training to supervisors, the department would send a clear message to employees that it places a high priority on ethical conduct.

AGENCY RESPONSES

The ombudsman sent a 42-page preliminary investigative report with eight recommendations to the Department of Natural Resources on April 30, 2007. DNR responded on May 14, 2007.

The ombudsman sent a 26-page version of the preliminary investigative report (with a one-page appendix) containing the DES survey and analysis with nine recommendations to the Department of Administration and the Department of Law on April 30, 2007. The Department of Administration responded on May 30, 2007. The Department of Law responded on May 24, 2007.

Summaries of the three departments' responses and the ombudsman's comments on them are set out below.

DEPARTMENT OF NATURAL RESOURCES

Department of Natural Resources Deputy Commissioner Richard LeFebvre responded to the Preliminary Investigative Report in a letter dated May 14, 2007. Mr. LeFebvre did not dispute the ombudsman's proposed findings that both allegations were **justified** by the evidence set out in the report. Mr. LeFebvre excused Mr. Saddler's performance as designated ethics supervisor for the department on the grounds that “during the time in question, Mr. Saddler was

significantly involved in public communications work in support of the state's natural gas pipeline efforts, an unusually demanding time for many in our department."

The Ombudsman is aware of DNR's workload, but Mr. Saddler did not offer this excuse to the ombudsman—that his other duties prevented him from carrying out the statutory duties of delegated supervisor for ethics for the Department of Natural Resources. Had he said this, the ombudsman would likely have considered whether he had abused his discretionary authority as DES by setting a higher priority on DNR business than on ethics. Regardless, the fact that DNR appears to have selected as DES someone who did not have adequate time to perform those duties reflects an unfortunate choice of priorities during the period in question. For that reason, Mr. LeFebvre's assurance that he would "counsel him on the necessity of being more diligent in the performance of these delegated responsibilities" seemed inadequate.

However, Ombudsman Linda Lord-Jenkins subsequently met with DNR Commissioner Tom Irwin and learned he has communicated to the department that he considers ethical conduct the Department's highest priority. At the commissioner's direction, DNR has taken concrete steps to ensure that ethics training and supervision meet high standards. Those steps are outlined later in this report.

The record will show that the two allegations against DNR's DES were found to be *justified*.

Mr. LeFebvre addressed the four proposed recommendations to DNR as follows. The DNR response follows each recommendation.

Recommendation 1: DNR should consult with the Department of Law to develop comprehensive Department policies and procedures for ethics for the DNR Ethics Supervisor and all staff.

DNR Response: We would request that this recommendation be modified to recommend that DNR only produce that portion of a policy and procedures manual that is specific to DNR. The manual should be a separate section that can supplement what should be available generally in manual format from the Division of Personnel and/or the Department of Law.

Ombudsman Response

As explained in the commentary accompanying this recommendation (set out above), the intent of this recommendation was for DNR to do what the department proposes in this response.

The record will show that DNR agreed to implement this recommendation in a manner consistent with the intent of the recommendation and presented a copy of the draft DNR ethics manual to Ms. Lord-Jenkins in October 2007.

Recommendation 2: DNR, in conjunction with the Division of Personnel, should review the actions of the Division of Parks and Outdoor Recreation referred to in this report to determine whether the supervisor needs special training in the Ethics Act.

DNR Response: A review is not necessary. The supervisor will be counseled on the Ethics Act.

Ombudsman Response

As explained in this report, DNR's DES found that two supervisors participated in a violation of the EBEA, yet the DES took no action to document these violations or to ensure that the

supervisor who still worked for the state understood the requirements of the law. Mr. LeFebvre proposed to dismiss this problem without any documentation and accountability.

It is rare for the ombudsman to recommend personnel action, but the evidence in this case appeared to show willful disregard of state ethics laws, particularly in light of a reminder by the previous department DES shortly before the violation. In a word, the supervisors' action bordered on misconduct. The ombudsman believed DNR should act firmly to ensure compliance with state ethics laws by DNR supervisory staff.

Although DNR initially appeared to disagree with this recommendation, the commissioner explained what measures the agency had taken with the employee. Those measures are confidential under State of Alaska Personnel Law but the ombudsman can say that the measures meet the intent of the recommendation.

Recommendation 3: DNR, in conjunction with the Division of Personnel, should separate training in ethics issues from the flood of first-day-on-the-job paperwork to emphasize the importance of this topic to new department employees.

DNR Response: Training should be a requirement for all new employees and should be scheduled and handled by the Division of Personnel as a matter of routine.

Ombudsman Response

The commentary accompanying this recommendation indicated that DNR should cooperate with the Division of Personnel in addressing improved ethics training for new employees.

The commissioner described the concrete steps the department has taken to work with the Department of Law and the Division of Personnel to improve ethics training within the department. The record will show that DNR agreed to implement this recommendation in a manner consistent with the intent of the recommendation.

Recommendation 4: DNR should provide department employees periodic refresher training in provisions of the EBEA as they apply to department business.

DNR Response: Ethics refresher training should be offered to departmental employees by the Division of Personnel. The Division of Personnel could simply track . . . performance evaluation dates and notice employees every five years that they are scheduled for their refresher class. The burden should be placed on Personnel to track, schedule and provide the training as a function of "state personnel management." DNR could do a department-specific session in conjunction with Personnel's refresher sessions.

Ombudsman Response

As documented in this investigative report, a March 18, 2006 e-mail from the previous DES reminded DNR employees to avoid potential conflicts of interest in department contracting, but two DNR supervisors ignored this reminder just three weeks later. For that reason, DNR's proposal to refresh training of department employees in the requirements of the EBEA "every five years" seemed unrealistic. However, after the ombudsman's preliminary finding in this case was issued, the department initiated a new ethics training program which meets the intent of this recommendation.

Commissioner Irwin indicated his willingness to conduct Department training consistent with training schedules implemented by the Alaska Legislature. The Legislature is conducting ethics training at the start of each legislative session.⁵

The record will show that DNR agreed in principle and practice with this recommendation.

Other comments by DNR:

Recommendations 5-9.

DNR Response: DNR concurs with Recommendations 5-9.

Recommendations 5-9 were addressed to the Division of Personnel and the Department of Law.

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In summary, the record will show that the two allegations against DNR were found to be *justified*.

Based on DNR's agreement to implement the proposed recommendations in a manner consistent with what the ombudsman intended, the record will show that the complaints have been *rectified*.

Department of Administration

On May 30, 2007, DOA Commissioner Annette Kreitzer responded to the ombudsman's proposed recommendations with some suggestions on how these might be improved and implemented.

Recommendation 7: The Department of Law should team with the Division of Personnel to develop a mechanism to provide regular ethics information and instructional updates for all state employees.

[DOA response:] I have contacted State Ethics Attorney Judy Bockmon at the Department of Law to initiate the planning of an ethics class to include the changes in HB109. I believe this class should be offered yearly to the designated Ethics Supervisors, executive and higher level managers in all departments, and senior human resources staff who investigate personnel matters that can have implication to the EBEA.

Recommendation 8: The Division of Personnel should augment the curriculum of the "supervisor academy" to include coverage of the requirements of the EBEA. In addition, the division should take steps to ensure that executive branch supervisory staff understands the resources available to address potential violations of the EBEA and to remove disincentives to reporting potential ethics violations to the Ethics Attorney or to the DES in executive branch agencies.

[DOA response:] I have directed the Division of Personnel Training & Development staff to amend the five-day Academy for Supervisors training to include the requirements of the Executive Branch Ethics Act and I expect the new curriculum component to be incorporated in the FY08 academy classes.

⁵ AS 24.60.150 (a)(4) (The Legislative Ethics Committee) within 10 days of the first day of each regular session of the legislature and at other times determined by the committee, (will) administer two types of legislative ethics courses that teach means of compliance with this chapter and are designed to give an understanding of this chapter's purpose under AS 24.60.010; . . .

Recommendation 9: The Division of Personnel should work with all state agencies to separate training in ethics issues from the flood of first-day-on-the-job paperwork to emphasize the importance of this topic to new department employees.

[DOA response:] I have conferred with my staff and believe a web-based EBEA course would be a valuable addition to classes the Division currently offers. A web-based course would be self-paced and available to all employees, even those in remote areas. We are also exploring whether a two-part training (the first being web-based and the second a classroom delivery) would be an effective tool in conveying the provisions of the EBEA. This training would be in addition to the information presented during New Employee Orientation.

Commissioner Kreitzer added a further comment:

Although I fully support your recommendations, some personnel issues involving potential ethics issues cannot be covered by informal or formal course delivery. The Division will continue to work directly with the Department of Law when such occasions arise.

Ombudsman Response

Ms. Kreitzer's responses satisfy the intent of the proposed recommendations to DOA. Ombudsman Linda Lord-Jenkins subsequently met with the commissioner to discuss these issues further.

Department of Law

The ombudsman provided to Law a short version of the preliminary investigative report containing a summary of the DNR ethics complaints together with the DES survey results and analysis and the proposed recommendations. Ombudsman Linda Lord-Jenkins subsequently met with Attorney General Talis Colberg, Deputy Attorney for the Civil Division General Craig Tillery, Assistant Attorney General David Jones, Law's former Ethics Attorney, and AAG Judy Bockman, the current Ethics Attorney. Law's response to **Recommendation 5** ran to three pages. Substantive comments are quoted below.

On May 24, 2007, the Department of Law responded to the ombudsman's proposed recommendations.

Recommendation 5: The Department of Law should devise a model policy manual for administrative agencies to use when evaluating reports of potential violations of the EBEA that come to the attention of a designated ethics supervisor in an executive branch agency.

Law Response:

We agree that the current guide titled "Responsibilities for Agency Designated Ethics Supervisors" should be expanded to include more detailed instruction regarding the DES responsibilities. Our goal is to have a revised guide available in the next three months.

The report recommends development of a uniform manual containing guidelines for the DES functions, samples of the various forms and reports, and investigative procedures. We agree that a manual to supplement the "Responsibilities" guide and existing web page materials with general information on investigative techniques would be useful. However, as you undoubtedly recognize, the DES's receive requests for ethics determinations and notices of potential violation involving a wide variety of circumstances, some unique to their particular agencies. There is simply no "one size fits

all” approach to ethics inquiries. The level of review is dependent upon the circumstances presented. We find that DES’s generally know what they need to do. If not, they call us. Nonetheless, we agree that additional guidance for DES’s would be helpful. As we said during the meeting, we would appreciate your sharing any investigative procedure materials you have that might serve as a model to develop similar guidance for the DES’s.

Ombudsman Response

The ombudsman did not intend to suggest that there is only one way to approach potential ethics violations. Our review led to the conclusion that some executive branch agencies have not done a good job of carrying out their tasks because DES’s do not appear to have adequate training or guidelines for performing the functions summarized in the guide currently available from the Department of Law. The ombudsman points out that the current guide contains a one-sentence instruction for DES’s that details the functions we focused on in this investigation: “As designated ethics supervisor, you must -- . . . Review all disclosures, investigate potential ethics violations, make determinations regarding conduct, and take action.” The ombudsman argued that expansion of the guide to explain these functions and what they entail would help DES’s to understand and perform their duties.

Law’s response seems ambivalent about the need to expand the guide and contains a statement that the present investigation suggests is inaccurate:

We find that DES’s generally know what they need to do. If not, they call us.

The ombudsman is not sure on what basis Law makes this claim, but the investigative report demonstrates that DNR’s DES, whom the Ethics Attorney identified as “one of the best” of the DES’s, neither knew what to do with two ethics reports nor called the Department of Law to find out. As the ombudsman said at the meeting with Department of Law staff, it is this DES’s performance, specifically, which led the ombudsman to initiate the DES survey to learn how well DES’s are trained. The survey results persuaded the ombudsman that the administrative structure of designated ethics supervisors enacted to carry out the requirements of the EBEA appears to have been implemented in such a way that DES’s have limited practical capacity to perform the functions itemized in the Department of Law’s guide.

On a different but related topic, Law’s response to this recommendation contains a detailed description of how disclosures of potential conflicts by Department of Law staff are handled by the Department of Law. Law offered no evidence that this procedure is followed by any other department in the executive branch. Compared to DOT/PF and DNR, moreover, Law is a relatively small department with a relatively high level of education and training. The ombudsman suggested that Law’s disclosure procedure might be a useful part of the training the department has undertaken to provide for executive branch agencies.

It should be pointed out, however, that *in none of the cases described in the investigative report did those with potential conflicts disclose them*. In these cases the potential violations were reported by persons who knew of them, rather than by those who committed the violations.

This leads to the heart of the issue. Law’s response to the report and recommendations states, “we agree with the thrust of your recommendations” but then seems to undercut that statement by effectively disputing that the process of screening, evaluating, and remedying violations of the Ethics Act can be improved in any meaningful way. The agency’s response stated that it is Law’s position that designated ethics supervisors should not handle complaints that are not written, signed, and sworn as provided by the formal complaint process set out at AS 39.52:

Finally, the [ombudsman] report makes the following comment: “*Complex or even moderately complex investigations should be referred to the Ethics Attorney, but reports of simple potential violations seem well within the capacity of a DES or Division of Personnel to investigate and evaluate, provided the investigator understands the scope and methodology such an investigation entails.*” This comment fails to recognize that the Ethics Act determines the responsibility for review of particular types of ethics matters. [your emphasis]

The point of the ombudsman’s report was to encourage handling of minor complaints by DES’s with or without the assistance of management consultants in the Division of Personnel *outside of, or in conjunction with, the formal process set out in the EBEA*. Our view is that strict adherence to the formal process effectively trivializes the authority of DES’s by ensuring that they will handle very few complaints. What state employee will file a sworn complaint against his or her co-worker or supervisor knowing that the DES or the Ethics Attorney will send the co-worker or supervisor a copy of the complaint and turn it into an adversarial process? Because Law has not kept track of numbers of complaints and investigations, there appears to be no real basis for averring that the formal complaint system as it is currently constituted works well.

This approach seems unnecessarily legalistic and counterproductive. It ensures that most witnesses to executive branch ethical misconduct will seek other means of bringing their concerns forward, and DES’s will continue to regard their ethics duties as subordinate to other duties they are paid to perform, a position Law expressly adopts when it states that ethics matters need not be a DES’s top priority. The ombudsman does not see how this encourages ethical conduct by executive branch employees or enables screening and evaluation of reported violations of the EBEA and implementation of appropriate remedies.

This means that instead of being handled within the framework of the Ethics Act, unsworn ethics complaints will instead be handled as misconduct complaints, as they have been in the past, by police agencies, the Division of Personnel, and the ombudsman, while the Department of Law will continue to oversee what appears to be an inefficient and ineffectual process. This discussion will return to this point below. Law also responded;

We are concerned that it may be difficult to ensure that a comprehensive printed manual is kept up-to-date. Consequently, we would rely on the Web page to provide current materials that are readily accessible by all DES’s and state employees as well as those outside the state government. It is easily updated.

Many state agencies now post their manuals on their Internet Web site for the reasons Law states. Despite Law’s stated reservation, this response meets the intent of this recommendation, and the record will show that the Department of Law accepted this recommendation.

Recommendation 6: The Department of Law should design a training program for designated ethics supervisors that covers the EBEA and a variety of actual or potential violations of the Ethics Act that illustrate how a DES should process reports of potential violations.

Law response:

We agree that the DES’s need training. Before receiving your report, we discussed plans for additional training, but did not schedule it pending receipt of delegations of DES functions from new commissioners, enactment of proposed ethics legislation during the 2007 legislative session and revision of available training materials to focus on the role of the DES.

Ombudsman Response

After responding to the ombudsman's preliminary finding, Law initiated a program to implement the training it discussed in its response to Recommendation 6. AAG Bockman reported to the ombudsman in October that she prepared a summary of the 2007 amendments to the Executive Branch Ethics Act and provided it to all agency and board designated ethics supervisors. This summary also was attached to an e-mail sent by Governor Palin to all state employees after she signed the Ethics Bill into law in July.

Also in July, Governor Palin asked Attorney General Colberg to provide ethics training for senior managers of the executive branch agencies. The training has been ongoing since that time. At Commissioner Irwin's suggestion, the first training sessions were held for DNR employees. As of late October 2007, Law had completed training for all of the agencies except the Department of Revenue (which was to be rescheduled) and Law's Criminal Division supervisors. The sessions in most instances have been presented at an agency's scheduled managers' meeting and have involved senior staff from the director level and up, although deputy directors may have attended in some instances. All designated ethics supervisors attended by virtue of their positions.

Ms. Bockman reported that the classes have typically lasted from one-and-one-half to two hours depending on the questions asked. Law used an updated version of an existing power point presentation and included mention of the 2007 amendments to the Executive Branch Ethics Act. Trainers also provide a handout with some general guidance and resource information. Ms. Bockman has taught most of the sessions but former Ethics Attorney Dave Jones filled in as necessary. Sessions have been conducted in Juneau and Fairbanks.

Attorney General Colberg also asked that the trainers present the training program to all of Law's Civil Division attorneys because they advise the agencies and boards and may be asked ethics-related questions. Law has held five sessions in addition to addressing the Civil Division Supervisors.

In addition, between late August and November, Law provided ethics training to eight boards and commissions who have requested it.

Ms. Bockman and Mr. Jones have met twice with DOA training staff to work on development of three training programs: one directed to all employees, one directed to the DES's, and one to the DOA Supervisor's Academy. DOA is taking the lead on developing these programs with substantive input from Law, according to Ms. Bockman.

Mr. Jones also created a new self-directed ethics PowerPoint presentation addressing the Ethics Act code of conduct and procedures. That program was added to the Law ethics Web page. Law provided a copy to all agency and board DES's for their use.

A manual for Designated Ethics Supervisors is in draft version, as the ombudsman recommended, addressing the responsibilities of the DES in greater detail.

Finally, Law distributed the Frequently Asked Questions regarding outside employment in June to all DES's for distribution to employees in conjunction with a reminder regarding the annual filing requirements.

These actions fulfill the intent of the ombudsman's recommendation.

Recommendation 7: The Department of Law should team with the Department of Personnel to develop a mechanism to provide regular ethics information and instructional updates for all state employees.

Law response

We have talked about sending out “ethics tips” periodically, but have not yet developed useful material. We are working on a “Frequently Asked Questions” document to go with this year’s reminder to agency employees regarding the annual outside employment disclosures [Note: “This FAQ is based on one developed and used at DNR.”] Once other “ethics tips” are prepared, we feel they should be distributed by the agency DES’s to give employees a connection to their DES and the DES a better presence in the agency.

Prior to the campaign season and just prior to the election, we worked with DOA to send out pertinent information regarding campaign activities to all employees statewide and could likely do something similar again. We are planning a similar effort to inform all employees of the changes in the Ethics Act.

We are aware that some of the agencies have developed ethics educational material and plan to collect, review and built on what they have developed.

Ombudsman Response

This response, coupled with Law’s actions as listed in Recommendation 6, meets the intent of the recommendation. The record will show that the Department of Law accepted this recommendation.

In addition to the recommendations addressed specifically to the Department of Law, two recommendations addressed to other agencies encouraged them to work with the Department of Law. These are reproduced below along with Law’s May 24, 2007 comments that appear to respond to them.

Recommendation 1: DNR should consult with the Department of Law to develop comprehensive Department policies and procedures for ethics for the DNR Ethics Supervisor and all staff.

Under the heading “Other Comments on Survey and Draft Report,” Law wrote:

2. We disagree that AS 39.52.920 either permits or mandates that agencies adopted separate Ethics Act policies or procedures.

Section 920 of the Ethics Act permits agencies to adopt written policies, with the approval of the attorney general, that impose limitations in addition to those imposed by the Ethics Act with respect to certain listed topics. The draft report suggests that the section authorizes or requires the agencies generally to adopt ethics policies, a code of conduct, or procedures. We do not believe that separate adoption of comprehensive ethics policies is a good idea, except to address unique aspects of an agency mission or internal administrative procedures designed to facilitate review of ethics disclosures and matters.

The noted DNR procurement policy is an example of a policy that is more restrictive than the Ethics Act. Contrary to the observation on page 23 of the draft report regarding waiver, we would construe the DNR policy to permit waiver only to allow an employee

to take actions that are permitted by the Ethics Act, but would be barred by the DNR policy if a waiver were not granted.

Ombudsman Response

This response does not directly state that it is in response to Recommendation 1, but it appears to argue against that recommendation. The ombudsman disagrees with this characterization of our position. We noted that the Department of Fish and Game already has adopted an ethics policy, explicitly invoking AS 39.52.920. Fish and Game's SOP II-040 (effective October 1, 1993) on "Ethics/ Standards of Professional Conduct" begins as follows:

This policy shall be known as the departmental ethics code or Standards of Professional Conduct. Its intent is to establish uniform standards of conduct for employees of the Alaska Department of Fish and Game (ADF&G). The policy is adopted pursuant to AS 39.52.920 which states:

Subject to the review and approval of the attorney general, an agency may adopt a written policy that, in addition to the requirements of this chapter, limits the extent to which a public officer in the agency or an administrative unit of the agency may:

1. acquire a personal interest in an organization or a financial interest in a business or undertaking that may benefit from official action taken or withheld by the agency or unit;
2. have a personal or financial interest in a state grant, contract, lease, or loan administered by the agency or unit; or
3. accept a gift.

The ombudsman asked if the Department of Law regards ADF&G's policy as being in violation of the Ethics Act. If this policy is acceptable, there is no reason for Law to argue against the recommendation. The ombudsman believes that DNR employees and the public would benefit from this type of policy.

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Recommendation 8: The Division of Personnel should augment the curriculum of the "supervisor academy" to include coverage of the requirements of the EBEA. In addition, the division should take steps to ensure that executive branch supervisory staff understands the resources available to address potential violations of the EBEA and to remove disincentives to reporting potential ethics violations to the Ethics Attorney or to the DES in executive branch agencies.

Under the heading "Other Comments on Survey and Draft Report," Law wrote [notes omitted]:

4. We disagree that changes must be made to make it easier to file a complaint.

The legislature made the policy choice that complaints must be in writing and signed under oath. The legislature also required that disclosures, including notices of potential violations, contain certifications of the truth of information presented, under penalty of perjury. Those requirements are intended to reflect the seriousness of an ethics charge and prevent abuse by the filing of frivolous or retaliatory accusations. The Act requires that copies of notices of potential violations and complaints be served on the accused. It mandates confidentiality of complaints and related investigations prior to a public accusation, unless waived by the accused. To promote disclosure, we also maintain confidentiality of requests for ethics determinations and notices of potential violations, as well as other informal inquiries, except to the extent necessary to review or investigate a matter.

The DES and state ethics attorney also sometimes act on information that is not sworn or certified. As Ms. Beiler apparently indicated, personnel officers may learn of ethics matters in association with other disciplinary action, which then may be addressed as part of the discipline imposed by the agency, referred to the attorney general or both. Information brought to the attention of the state ethics attorney may also trigger a preliminary investigation that could result in a formal complaint and accusation. Potential ethics violations are also sometimes identified, addressed and resolved by telephone contact or e-mail advice, prior to submission of a disclosure to a DES. We will focus part of the planned DES training on this issue. [italics added]

We believe the range of procedures in place provide an appropriate environment for addressing ethics issues and does not discourage serious allegations.

Ombudsman Response

The ombudsman's response to this is to highlight the second paragraph above. This is what the ombudsman proposed, not the straw man Law argues against.

Regarding the first paragraph above, one broad point Law raises in its objections to the ombudsman's recommendations deserves comment; namely, that the requirements of the formal process set out in the EBEA "are intended to reflect the seriousness of an ethics charge and prevent abuse by the filing of frivolous or retaliatory accusations." Distinguishing between substantive complaints and those without merit is a problem any investigator must deal with day in and day out. Frivolous complaints are relatively easy to screen out. The phrase "retaliatory accusations," however, suggests that the merits of a complaint depend on the motives of the complainant.

Long experience accepting and evaluating complaints against state government agencies, often ones directed at individual state employees, persuades the ombudsman that while frivolous and retaliatory complaints are made with some frequency, *the investigator's job is always to determine whether there is merit to the complaint, regardless of its provenance.* If a state employee is embezzling money from an agency account, should the state look the other way if it determines that the complainant dislikes that employee? Is the point to detect and remedy unethical conduct by state employees, or to police complainants?

Nothing in the ombudsman's comments or recommendations was intended to suggest that those accused of ethics violations should not be given notice of a complaint and elementary protections against fraudulent accusations. Indeed, one usually cannot investigate such a complaint without contacting the accused. Whether disclosure of the complainant's identity is necessary or desirable may vary with the circumstances of the complaint. But the ombudsman would suggest that the state employs many persons capable of investigating an alleged violation of the Ethics Act. It seems reasonable that the designated ethics supervisor for an executive branch agency should receive the training, resources, and guidance to perform this task not just in response to sworn, written complaints but also in response to informally transmitted information that an employee in their department may be violating state ethics laws. Otherwise the term "designated ethics supervisor" is something of a misnomer.

Moreover, if a DES does not know how to investigate a simple complaint, how can anyone expect he or she will know how to investigate a complex one? As this investigative report points out, in many cases reported ethics violations are likely to be minor or unintentional, warranting not much more of an intervention than a "heads up." On the other hand, accountability and the human resources principle of progressive discipline require that there be documentation of ethics violations for purposes of notice and future reference. The employee who repeatedly violates state ethics laws despite education and reminders should be held accountable in an appropriate

manner. This is difficult when the DES keeps no records, as happened in the case of DNR's DES, or when the employee's supervisor wants to overlook or even permit ethics violations, as happened in a case involving Health and Social Services that the ombudsman recently investigated (A2006-0054).

Taken in their entirety, Law's responses suggest that Law does not disagree, as Ms. Bockmon assured the ombudsman investigator at an early stage of this investigation, that it is permissible for DES's to consider reports of potential violations of the ethics laws without requiring a sworn written statement. There will undoubtedly be instances when it is appropriate to invoke the formal process set out in the EBEA, but the point was and remains that many instances of minor violations might more appropriately be handled informally. It is with this informal process in mind that the ombudsman proposed these recommendations. The ombudsman did not propose to alter or ignore the statutes.

Because the ombudsman is persuaded by our meeting and by parts of Law's written response that the department does, in fact, "agree with the thrust of" the recommendations and proposes to implement some constructive changes in how DES's are trained and guided, the ombudsman will regard Law's response as accepting the recommendations in a manner consistent with the ombudsman's intentions, as well as providing helpful guidance on what aspects of the process set out in the Ethics Act cannot be altered without action by the legislature.

The record will show that the Department of Law agreed to implement the ombudsman's recommendations.

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Finally, the response from the Department of Law offered some helpful clarifications:

1. The draft report does not clearly distinguish between standards and procedures for agencies and those for boards and commissions.

The Ombudsman's staff surveyed DES's from all executive branch agencies and some boards and commissions. The draft report seems to focus on procedures and training for the agencies, rather than boards and commissions, but does not clearly make that distinction in reporting the results and making recommendations. Some Ethics Act standards that apply to public employees do not apply to board and commission members. One example is the outside employment disclosure requirement, which is discussed several times in the report. Also there are separate procedures for board member disclosure of conflicts on the public record. [Note: "See new guidance for boards and commissions titled, 'Ethics Act Procedures for Boards and Commissions,' prepared and distributed in December 2006 and available on the ethics web page."]

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3. We believe appropriate officials have been delegated the DES function. Each agency is best able to address administrative impacts.

The legislature made the policy choice that the agency heads would serve as the DES's but gave them the practical flexibility to delegate the responsibility. Agency heads typically delegate to high-level departmental officials in recognition of the significance of the subject. Based on the quarterly reports and inquiries we receive, ethics review at the agencies is not a function that requires a full time DES. Certainly, other agency business at times may demand a higher priority than a particular ethics matter. We assume that the high-level official to whom the function is delegated can address the setting of priorities

with the agency head as necessary. If a DES needs administrative support, it should be addressed by the agency.

Ombudsman Response

The ombudsman agrees generally with comment 3 above but would note that the results of the DES survey included in this report suggest it is unclear how accurate Law's impression is, "based on the quarterly reports and inquiries [they] receive." Many survey respondents were unsure what matters they should report to the ethics attorney, and the DES who was the subject of this investigation said he did not report either violation of the EBEA to Law. In addition, the ombudsman disagrees that the priority of ethics matters should be determined by the other priorities of an agency if the executive branch wants to avoid giving the public the impression that ethics are not of paramount importance to state government administrators. If ethics matter, they deserve high priority. Virtually all DES's the ombudsman surveyed indicated they give ethics issues high priority. Law should not be downplaying the importance of this statutory responsibility.

This complaint will be closed as justified and partially rectified. The Ombudsman will request a status report from all three agencies in 12 months.

FINDING OF RECORD

APPENDIX A

12/06

EXECUTIVE BRANCH ETHICS ACT

Responsibilities of Agency Designated Ethics Supervisors

The designated ethics supervisor for each department in the executive branch is the commissioner. The designated ethics supervisor for the University of Alaska is the president. These officials typically delegate the responsibility to another public officer.

As designated ethics supervisor, you must --

1. Ensure that your personnel office provides a copy of the guide, **Ethics Information for Public Employees**, to all new employees -- and keeps a supply of disclosure forms.
 - ◆ The guide, disclosure forms, statutes and regulations are available for review and copying on the Department of Law ethics website: <http://www.law.state.ak.us/doclibrary/ethics.html>. If access to this page is not available, please contact the Attorney General's office at 465-2412.
2. Review all disclosures, investigate potential ethics violations, make determinations regarding conduct, and take action.
 - ◆ You may request advice from your agency's Assistant Attorney General or from the Department of Law State Ethics Attorney, Judy Bockmon, 269-5216.
 - ◆ Your request and the response of the Department of Law are confidential.
 - ◆ You must provide a copy of a written determination regarding a notice of potential violation to the public employee who is the subject of the notice.
 - ◆ You must also provide a copy of all determinations to the Attorney General for review. They may be attached to the quarterly ethics report (see paragraph 5).
3. Remind employees to report their outside employment (see disclosure form) at least once each calendar year (July 1). The Department of Law will send you a reminder in June.
4. Keep employee disclosure statements (of potential violations, outside employment, receipt of gifts, and interests in grants/contracts/leases/loans) on file in your office. Disclosure of a gift received from another government must be forwarded to the Office of the Governor.
5. Submit an ethics report to the Department of Law in April, July, October, and January for the preceding quarter. You will receive a reminder. There is a sample report on the ethics web page.
 - ◆ Mail or fax to Anne-Marie Palumbo, Legal Coordinator, Department of Law. [MS 0300; P.O. Box 110300, Juneau, AK 99811-0300; fax 465-2539